The Future of New Zealand's Accident Compensation Scheme

by Richard S. Miller

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Whenever I walk in a Wellington Street
I'm ever so careful to watch my feet;
For the broken glass that's scattered around
The fruits of labourers high off the ground.
And I squint my eyes as dust flies fast
From another grave of a building past.
I daren't slow down, or come to a halt,
Or I might get hit by a flying bolt.
If a worker's shed on a platform high,
Should happen to catch my wary eye,
I cross the road to miss the terror,
As it crashes down—human error!
I move on fast to avoid the trouble
That's parcelled up in construction rubble,
And masonry pieces that rocket down
From the tower blocks that litter the town.
And as I walk, my head's held high,
searching for workers against the sky,
Who watch from above and growl, "He's mine,
As soon as he's silly and comes into line."
So whenever I walk in a Wellington Street,
I'm ever so careful to watch my feet.

From Editorial, *A A Milne's Wellington?*[1]

In late 1986 and in 1987 there was in New Zealand a public furor over sharp increases in levies imposed on employers to support New Zealand's unique total non-fault accident compensation system—a furor which rivaled in intensity and media coverage[2] the tort and liability insurance "crisis" in the

* Professor of Law, William S. Richardson School of Law, University of Hawaii. The author wishes to thank the administration, faculty, and staff of the Faculty of Law of the Victoria University of Wellington for their generosity in making their facilities available to the author during his stay in New Zealand and, particularly, to thank Senior Lecturer John Miller for his comments on the status of proposed amendments to the Accident Compensation Act and on other related issues.

[1] Dominion (Wellington, N.Z.), Oct. 24, 1987, at 8, col. 1.

[2] *See infra* notes 124-37 and accompanying text.

United States. It is the purpose of this article to examine the problems which led to the New Zealand controversy and their causes, and to discuss some solutions proposed by the New Zealand Law Commission, by me, and by others as well as possible implications of the New Zealand experience for reform elsewhere.

I. INTRODUCTION

The New Zealand Accident Compensation Act[3] establishes a comprehensive no-fault scheme (Compo) for compensating accident victims. In exchange for substantial benefits including virtually complete medical and rehabilitation expenses, substantial wage replacement for earners whether they are injured on or off the job, and payment of some noneconomic losses, accident victims in New Zealand have largely given up their common law right to sue in tort for damages for personal injuries.[4]

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[3] Originally Accident Compensation Act, 1972, 1 N.Z. Stat. 521 (1972), as amended. This act was consolidated and amended by Accident Compensation Act, 1982, 3 N.Z. Stat. 1552 (1982), and its subsequent amendments.

There has, of course, been considerable interest in and discussion about the Act by academics and practitioners both inside and outside New Zealand. *See, e.g.*, A. BLAIR, ACCIDENT COMPENSATION IN NEW ZEALAND (1978);T. ISON, ACCIDENT COMPENSATION: A COMMENTARY ON THE NEW ZEALAND SCHEME (1980) [hereinafter T. ISON]; G. PALMER, ACCIDENT COMPENSATION: A STUDY OF LAW AND SOCIAL CHANGE IN NEW ZEALAND AND AUSTRALIA (1979) [hereinafter G. PALMER, ACCIDENT COMPENSATION]; J. STAPLETON, DISEASE AND THE COMPENSATION DEBATE (1986) [hereinafter J. STAPLETON]; Henderson, *The New Zealand Accident Compensation Reform*, 48 U. CHI. L. REV. 781 (1981) [hereinafter Henderson]; Blair, *The "Accident" of a Heart Attack*, 1982 N.Z.L.J. 199; Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73 CALIF. L. REV. 976 (1985) [hereinafter Brown]; Fleming, *Is There a Future for Tort?*, 58 AUSTL. L.J. 131 (1984); Gaskins, *Tort Reform in the Welfare State*, 18 OSGOODE HALL L.J. 238 (1980); Gellhorn, *Medical Malpractice Litigation (U.S.)—Medical Mishap Compensation (N.Z.)*, 73 CORNELL L. REV. 170 (1988) [hereinafter Gellhorn]; Klar, *New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective*, 33 U. TORONTO L.J. 80 (1983) [hereinafter Klar]; Love, *Actions for Non-physical Harm: The Relationship Between the Tort System and No-Fault Compensation (With an Emphasis on Workers' Compensation)*, 73 CALIF. L. REV. 857, 876-77 (1985) [hereinafter Love]; Miller, *The Accident Compensation Act and Damages Claims*, 1987 N.Z.L.J 159, 184; Palmer, *Dangerous Products and the Consumer in New Zealand*, 1975 N.Z.L.J. 366; Pedrick, *Palmer's Compensation for Incapacity: The New Zealand and Australian "No Fault" Story*, 1981 UTAH L. REV. 115; Vennell, *Informed Consent or Reasonable Disclosure of Risks: The Relevance of an Informed Patient in the Light of the New Zealand Accident Compensation Scheme*, 13 N.Z.R.L. 160 (1987) [hereinafter Vennell, *Informed Consent*]; Vennell, *Problems of New Zealand's No-Fault Accident Compensation Scheme*, 22 LAW SOC. J. 44 (1984); Vennell, *Unlocking the Turntable*, 1975 N.Z.L.J. 277; Vennell, *Some Kiwi Kite-Flying*, 1975 N.Z.L.J. 254.

[4] Accident victims retain their rights to sue for punitive damages, *see infra* note 205 and accompanying text, and there may remain a residual right of some medical malpractice victims who are found not to have suffered "injury by accident" or "medical misadventure" to bring a

There can be no doubt that Compo achieves significant compensation goals which are clearly not well served by the common law tort liability system: virtually all accident victims are covered; all reasonable medical and rehabilitation needs are provided; wage replacement for injured earners is substantial—amounting to eighty percent of the earnings loss for most earners, continuing if necessary until retirement; and compensation for most victims is promptly paid when and as needed.[5]

On the other hand, other goals—deterrence of accidents[6] and justice and fairness in the settlement of disputes arising from accidents—as well as other significant but less well recognized benefits of the common law system, are poorly served by Compo or not served at all.

The reasons for these differences are, of course, that on the one hand the common law tort liability system, particularly insofar as it is based on negligence, does not purport to be a compensation system, except conditionally and incidentally,[7] and, on the other hand, that Compo is intended to serve primarily as a compensation system. Indeed, Compo does not purport to serve justice goals at all nor does it serve accident prevention goals (except in the most attenuated and insignificant way) though it pretends to do so.[8]

Nevertheless, if the common law system, as some have alleged, serves deterrence goals poorly or not at all, then arguably it would also follow that because of its heavy costs it should be replaced by a system like Compo,[9] notwithstanding the extent to which the common law might serve justice or other goals in some instances. In that event the game (tort liability) would probably still not be worth the candle. Conversely, however, it would be even greater folly to adopt Compo and concurrently scrap the common law system, as New Zealand has done, until either the ineffectiveness of the tort system as a deterrent to

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common law action. *See* Vennell, *Informed Consent*, *supra* note 3.

[5] *See infra* text accompanying notes 16-66.

[6] *See infra* notes 189-246 and accompanying text.

[7] G. PALMER, ACCIDENT COMPENSATION, *supra* note 3, at 35; Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime"*, 1 U. HAW. L. REV. 1, 23 (1979). *Cf.* Owen, *Deterrence and Desert in Tort: A Comment*, 73 CALIF. L. REV. 665, 674 (1985). *See* Gordon v. Parker, 83 F. Supp. 40, 42 (D. Mass. 1949) ("Tort law, like its younger brother criminal law, was sired by a policy of regulating the social order and substituting legal process for self-help. To be sure, tort law also always has a compensatory element. But that is of secondary consequence . . . .") (Wyzanski, D.J.) (citation omitted).

[8] *See infra* text accompanying notes 188-203.

[9] *See* Sugarman, *Doing Away With Tort Law*, 73 CALIF. L. REV. 555 (1985) [hereinafter Sugarman]. *See generally Symposium: Alternative Compensation Schemes and Tort Theory*, 73 CALIF. L. REV. 548 (1985). *Cf.* Zuckerman, *Tort Reform*, U.S. NEWS & WORLD REP., Sept. 7, 1987, at 68 (recommending adoption in the United States of a no-fault accident compensation scheme like New Zealand's).

accidents has been demonstrated[10] or until a reasonably well-tested accident prevention alternative is in place.

Ideally, since Compo has been in operation in New Zealand since 1974, we should have had the data necessary to assess whether elimination of the common law tort system has in fact had any impact on accident rates. Unfortunately, however, the data is not available.[11] The only study to date[12] seems inconclusive at best and there are reasons to question even its tentative conclusions.[13]

It is my principal thesis that the almost complete abolition of tort liability for personal injury in New Zealand has led to a serious failure of deterrence, to an increase in accidents and accident rates which has probably contributed significantly to a sharp increase in the costs of Compo, and to the attendant public crisis. Based upon this thesis, I have proposed that the tort system be reintroduced in New Zealand to supplement Compo. This proposal, contained in a submission in 1987 to the New Zealand Law Commission,[14] is described and discussed below along with the Law Commission's own recent proposals for reform of Compo. Finally, the New Zealand experience will be discussed in

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[10] There is reason to believe that the tort system as it existed in New Zealand prior to the adoption of Compo was in fact fairly ineffectual as a deterrent to accidents. Thus, for example, in 1967 only nine million dollars was spent by owners of motor vehicles in New Zealand for compulsory third-party insurance. THE ROYAL COMMISSION OF INQUIRY, COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND 229 app. (1967) [hereinafter WOODHOUSE REPORT]. And in 1970 compulsory third-party auto insurance for a private motor vehicle was only $7.90 per year. G. PALMER, ACCIDENT COMPENSATION, *supra* note 3, at 83. This may have been the result of a system where there is no contingent fee allowed in personal injury cases, where the losing party is chargeable with costs, including legal fees of the winning party, and where there is therefore significant financial hazard to pursuing a personal injury action and little risk in being inadequately insured. Under such a system there may be little direct deterrence by way of individual concern for the consequence of liability and little by way of general deterrence to raise the cost of driving. If this is correct, then the advent of Compo and the elimination of the personal injury tort action would not have had an important impact on deterrence, of which there was very little even before Compo.

Indeed, while commenting during a faculty seminar led by the author at Victoria University on his perception that Wellington was an unusually unsafe and hazardous place and suggesting that the absence of a tort action may have reduced or eliminated the motivation for safety, a senior staff member of the Law Commission remarked that New Zealand had always been that way, even before Compo.

[11] G. PALMER, ACCIDENT COMPENSATION, *supra* note 3, at 378-80; Brown, *supra* note 3, at 980.

[12] Brown, *supra* note 3, at 960.

[13] *See infra* note 325.

[14] Submission by R. Miller to the Director, New Zealand Law Commission, on the New Zealand accident compensation scheme, (May 15, 1987) [hereinafter Submission to Law Commission] (available in Faculty of Law Library, Victoria University of Wellington). *See also* Miller, *Plugging the ACC's Biggest Leak*, Nat'l Bus. Rev., July 24, 1987, at 17, col. 1.

relation to the ongoing debate on tort reform in the United States.

II. A DESCRIPTION OF THE ACCIDENT COMPENSATION SCHEME

While the details of Compo have been well-described elsewhere,[15] a summary of its basic features and its policy objectives, particularly as compared with the common law tort/liability insurance system, will prove useful here.

A. Major Features

In general, Compo provides compensation, without regard to fault, to New Zealanders and to others present in New Zealand who suffer personal injury or death as a result of "injury by accident."[16] The Act, however, prohibits common law tort actions to recover compensatory damages for personal injury or death covered by Compo; that is, caused by "injury by accident."[17] What constitutes an accident, for purposes of the Act, is determined from the victim's point of view. Thus, injuries caused by intentional torts as well as injuries caused by negligence, medical misadventure (including most medical malpractice), product defect, and pure accident are covered along with certain industrial diseases and industrial deafness.[18] In consequence, Compos' coverage for non-illness caused injuries and disablement is almost universal, excluding only some self-inflicted injuries, some injuries caused in the commission of a crime, and, possibly, some adverse consequences of medical treatment and of failure by a medical professional to diagnose illness or to secure an informed consent.[19] The corollary is that the abolition of tort actions to recover damages for personal injuries is, likewise, virtually complete.

1. Benefits

Benefits under the scheme fall into five categories: earnings-related compensation (ERC), medical expenses, rehabilitation expenses, noneconomic losses, and other miscellaneous costs of accidents.

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[15] *See, e.g.*, G. PALMER, ACCIDENT COMPENSATION, *supra* note 3; Henderson, *supra* note 3.

[16] Accident Compensation Act, 1982, § 26.

[17] *Id.* § 27.

[18] *See generally* G. PALMER, ACCIDENT COMPENSATION, *supra* note 3, at 249-62; T. ISON, *supra* note 3, at 18-39.

[19] Vennell, *Informed Consent*, *supra* note 3.

a. Earnings-Related Compensation[20]

In general, the Act provides for payment of eighty percent of lost wages or earnings after the first week of incapacity for earners (including the self-employed) whether they are injured on or off the job. Where the injury is work-related the employer must pay the first week's ERC. There is a ceiling on the total amount of wages eligible for ERC, which translates into a weekly maximum of ERC payments. As of June, 1987, the maximum payment was $976[21] per week.

ERC may continue as long as needed until retirement age.[22] Of particular interest is a provision, designed to insure that the receipt of ERC in lieu of wages does not discourage rehabilitation, *which prohibits a reduction in ERC, even though the victim's earning capacity increases*, once a assessment is made by the Accident Compensation Corporation (ACC)[23] that an earner is permanently disabled.[24] Once an earner has been deemed permanently incapacitated, he or she may be entitled to periodic percentage increases in weekly ERC payments, ordinarily based upon increases in the cost of living.[25] While such increases have not necessarily kept pace with the cost of living, they have been fairly generous.[26]

While New Zealand earners are thus entitled to rather fulsome benefits to compensate for their lost earnings, others who suffer injury by accident either do not receive ERC or may receive benefits which fall well below their actual earning capacity. These include visitors to New Zealand[27] and those, such as housewives, children, the elderly, and the long-time unemployed who, notwithstanding their *earning capacity*, either do not have earnings or have only meager

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[20] *See* Accident Compensation Act, 1982, §§ 52-71, as amended.

[21] ACCIDENT COMPENSATION CORPORATION, UNINTENTIONAL INJURY: NEW ZEALAND'S ACCIDENT COMPENSATION SCHEME 32 (1987) [hereinafter UNINTENTIONAL INJURY]. Except where otherwise indicated, dollar amounts are in New Zealand dollars. At the times referred to in this article the exchange rate was about N.Z.$1.00 = U.S.$0.58 or 0.59.

[22] Accident Compensation Act, 1982, § 66. The date of termination of ERC benefits may vary according to the age of the earner at the time of the accident and the earner's retirement age. New Zealand provides significant retirement benefits (superannuation) for New Zealand workers.

[23] The Accident Compensation Corporation is a governmental entity which administers the Accident Compensation Act. *Id.* §§ 4-10.

[24] *Id.* § 60(5). Note that increases in weekly compensation are permitted where it is determined that the capacity of a person deemed permanently incapacitated has deteriorated. *Id.* § 60(4).

[25] *Id.* § 60(7). These increases are effected through Orders in Council issued by the Governor-General on the recommendation of the Government.

[26] *See, e.g.*, Order in Council 1986/130 (June 30, 1986) (11.25 percent); *id.*, 1987 (May 15, 1987) (9.4 percent).

[27] Accident Compensation Act, 1982, § 52(2)(j).

earnings at the time of their injuries.[28]

b. *Medical, Hospital, and Other Related Expenses*

Virtually all medical and surgical treatment, hospital care, and pharmaceuticals required as a result of an injury by accident will be provided or reimbursed either under the general social security system of New Zealand, by the ACC, or by both.[29] The public health system generally provides very low fees to physicians (about $14.25 per visit)[30] and its hospital system has been subject to considerable complaint.[31] Compo covers the amounts of medical costs in excess of those paid by the Social Security system up to a total which the ACC determines are "reasonable by New Zealand standards."[32]

While the medical benefits paid through Compo are generally more complete and allow wider options than the public health system, including private hospitalization and private surgeons,[33] the availability and utilization of public health benefits for accident victims makes its virtually impossible to tally the health care costs attributable to accidents. That is, medical costs of accidents may be covered by the social security system and never identified as accident costs.[34]

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[28] Special provision is made for calculating the payment of ERC to employees or apprentices who suffer accident while under the age of 20 and who would have earned greater amounts after age 20, *id.* § 62, and to those who suffer "any loss of potential earning capacity," *id.* § 63. The latter provision, however, only applies to those who, at the time of the accident, are under the age of 16 or to those who were or had been actively engaged in studying or training for an occupation, career, or profession and were about to embark upon it. *Id.* § 63(1)(c). It then sets the earnings of such persons at a prescribed amount (subject to a discretionary fifty percent increase for a particular individual) which may provide a considerably lower ERC than might be earned if the victim's actual potential earning capacity were realized. *Id.* §§ 63(2), (5).

[29] UNINTENTIONAL INJURY, *supra* note 21, at 46-47.

[30] *See* LAW COMMISSION, REPORT NO. 4: PERSONAL INJURY: PREVENTION AND RECOVERY, REPORT ON THE ACCIDENT COMPENSATION SCHEME para. 174 (1988) [hereinafter SECOND WOODHOUSE REPORT]. The usual fees are about $22 per visit. *Id.*

[31] *See, e.g.*, Busby, *Bed crisis looms—Hospital room 'appalling'*, Dominion (Wellington, N.Z.), May 8, 1987, at 10, col. 6.

[32] Accident Compensation Act, 1982, § 75(1)(b); UNINTENTIONAL INJURY, *supra* note 21, at 46.

[33] Requests for admission to private hospitals have to be specially made to the ACC and approved. The ACC takes the following position: "The Corporation . . . is of the opinion that the public system copes well with urgent surgery. It believes that admission of ACC clients to private hospitals should only be for non-urgent surgery, and even then only when adequate arrangements cannot be made for surgery in the public system." UNINTENTIONAL INJURY, *supra* note 21, at 47.

[34] *See* ACCIDENT COMPENSATION CORPORATION, COMPENSATED ACCIDENTS FOR THE YEAR ENDED 31 MARCH 1988 1 (1988) (excluding from the accident statistics for 1988 accidents resulting only in medical treatment for which the physician is reimbursed directly by the social security system).

Conversely, the system of accounting and paying medical care providers for medical costs of accidents is not tightly controlled; physicians generally determine for themselves whether particular patients are being treated for injury by accident and bulk-bill the ACC for such treatment.[35] It is highly probable, therefore, that some medical costs which are reported and paid by the ACC as arising from accidents may in fact have arisen from causes, such as illness, which are not covered by Compo.

Other medically-related accident expenses which are paid by ACC for accident victims include dental treatment,[36] travel expenses to secure medical treatment,[37] and damage to artificial limbs, glasses, or clothing.[38]

c. Rehabilitation Expenses

The ACC is given broad responsibility for promoting the complete rehabilitation of accident victims.[39] Its function in practice is best stated in its own words:

> In broad terms the total rehabilitation process may encompass medical and paramedical, vocational, social, financial security and family requirements. It is a total process that unfolds over time and involves input from many sources. The rehabilitation services provided by the Corporation is but a segment of this process. A primary role of the Corporation is to make the connections between the injured person and the existing resources and services and, in so doing, provide the basis for informed choice.
>
> ACC's rehabilitation coordinators help injured persons to assess their needs and examine the possible options so that a personal choice can be made. The ideal is to achieve independent living on the part of the injured person. Once the needs have been assessed, the coordinators ensure that those needs are met to the fullest extent possible. Where necessary the ACC may become a direct provider of resources through financial assistance for housing alterations, motor vehicle adaptions, restraining programmes and the provision of aids for daily living.[40]

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[35] *Cf.* Accident Compensation Act, 1982, §§ 75(5) and (6) which, in the cases of certified medical practitioners and qualified radiologists, physical therapists, and providers of other paramedical services, authorizes the ACC to pay for their services "without further inquiry as to whether or not the services were required as a result of personal injury by accident" where the practitioner who has provided or authorized the other providers to furnish services has certified "that he considers that the services were required as a result of personal injury by accident . . . ." *Id.*

[36] *Id.* § 76.

[37] *Id.* §§ 72-74.

[38] *Id.* § 77.

[39] *Id.* §§ 36, 37.

[40] UNINTENTIONAL INJURY, *supra* note 21, at 65, 66.

d. *Noneconomic Losses*

Because Compo surrendered potentially large awards under the common law damage action in exchange for adequate and certain, but less bonanza-like, compensation, there has from the beginning been a demand from labor unions to retain and indeed to increase lump sum awards for noneconomic losses to replace some of the tort damages which have been given up.[41] From the beginning, therefore, the Act has allowed payment of lump sums, in addition to other compensation for actual economic losses, for "permanent loss or impairment of any bodily function (including the loss of any part of the body)"[42], and for pain and suffering, loss of amenities, disfigurement, and loss of capacity for enjoying life.[43] For non-earners, these noneconomic losses may constitute the principal compensation, other than medical expenses, paid for disabling accidents.

Currently, the permanent loss or impairment of a bodily function is compensated on the basis of a schedule appended to the Accident Compensation Act.[44] The maximum payable here is $17,000.[45] Assessment of the amount of payment for pain and suffering, disfigurement and loss of enjoyment or amenities of life is "a subjective and discretionary matter."[46] The maximum award for this category is $10,000.[47] Payments may be made from both categories to a single victim, $27,000 being the maximum award. However, no payments under these categories for noneconomic loss may be made unless the victim survives the accident by twenty-eight days. Moreover, entitlement to such payments do not survive the death of the victim.[48]

e. *Miscellaneous Benefits*

Other benefits payable by Compo include:

(1) ERC to the surviving dependent family members of an earner[49] who dies

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[41] G. PALMER, ACCIDENT COMPENSATION, *supra* note 3, at 129. Prior to Compo, workers were entitled to bring common law actions against their employers and also to seek workers' compensation. *Id.* at 26.

[42] Accident Compensation Act, 1982, § 78.

[43] *Id.* § 79.

[44] *Id.* at 140 (first schedule).

[45] *Id.* § 78.

[46] UNINTENTIONAL INJURY, *supra* note 21, at 58.

[47] Accident Compensation Act, 1982, § 79(1).

[48] *Id.* § 78(9) (impairment); *id.* § 79(6) (pain and suffering, etc.).

[49] A person who, not being married to the earner, "cohabited [with him or her] immediately preceding the date of the deceased person, and, in the opinion of the Corporation, . . . entered into a relationship in the nature of marriage" with the deceased person is included within the definition of "spouse." *Id.* § 65(1).

as a result of injury by accident.[50] The surviving spouse is entitled to receive up to three-fifths of the deceased earner's ERC, payable until the earner's entitlement to ERC would have ended or upon the death or remarriage of the dependent spouse.[51] Dependent children are each entitled to receive up to one-fifth of the deceased parent's ERC if one parent remains alive[52] or two-fifths if both have died.[53] Dependents of the deceased earner other than the spouse or surviving children may also be entitled to receive ERC in amounts similar to those available to a surviving spouse or child.[54]

(2) Compensation, in such amounts as the ACC "thinks fit for actual and reasonable expenses and proved losses necessarily and directly resulting from the [accident victim's] injury or death . . . ."[55] There are a number of specific exclusions applicable to this provision, such as property damage,[56] the opportunity to make a profit,[57] and losses arising from inability to perform a contract,[58] but it is not clear what is included.

(3) Compensation to members of the accident victim's household for substitute household or domestic services to replace those previously provided by the victim.[59]

(4) Compensation for losses or expenses incurred by a person in rendering help to the accident victim or "in taking any necessary action following and consequential upon the death of the injured person."[60]

(5) Compensation for "constant personal attention" for the victim where such attendant care is necessary.[61]

(6) Compensation for loss of pension or annuity rights upon which the claim-

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[50] *Id.* § 65.

[51] *Id.* § 65(2)(a). When a dependent widow or widower remarries, he or she is entitled, if under 63 years of age, to receive a lump sum equal to two year's of the ERC payments that would have been payable to him or her had there been no remarriage. *Id.* § 70.

[52] *Id.* § 65(2)(b).

[53] *Id.* § 65(4).

[54] *Id.* § 65(2)(c).

[55] *Id.* § 80(1).

[56] *Id.* § 80(1)(a).

[57] *Id.* § 80(1)(d).

[58] *Id.* § 80(1)(e).

[59] *Id.* § 80(2)(a).

[60] *Id.* § 80(2)(b). "This provision has been interpreted as covering the cost, inter alia, of hospital visits to give help to the injured person, or of home help to the person in convalescence. But the emphasis . . . is on giving help to the injured person, and unless it can be said, for example in the case of hospital visits, that they had a definite therapeutic purpose in giving 'help', the expenses cannot be claimed." UNINTENTIONAL INJURY, *supra* note 21, at 52.

[61] *Id.* at (3). "It has been held (*Accident Compensation Appeal Authority: Decision 595*) that such compensation is limited to cases where the incapacity is so grave that the person is incapable of care for himself/herself and requires, as a matter of necessity, constant personal attention." UNINTENTIONAL INJURY, *supra* note 21, at 52.

ant was dependent, caused by the death of the accident victim.[62]

(7) Compensation for funeral expenses for accident victims.[63]

(8) Lump sum payments. In the event of death as a result of personal injury by accident, the surviving spouse, if totally dependent on the deceased, receives a lump sum of $4,000; partially dependent spouses may receive lesser sums.[64] Surviving dependent children likewise receive up to $2,000 each.[65] These payments are completely independent of any other benefits which may be payable on account of the victim's death.[66]

2. *Funding Sources*

Compo is funded from three different sources: Levies upon employers and self-employeds based upon size of payroll (earners account),[67] levies upon automobile owners (motor vehicle account),[68] and general revenues (supplementary account).

The largest source, paying approximately sixty-six percent of the total cost of Compo,[69] and the source which has been most responsible for the creation of the outcry and potential crisis for Compo has been the earners account. All payments of compensation to earners who suffer accidents, *on or off the job*,[70] except for motor vehicle accidents, come exclusively from the earners account. And all income to the earners account comes from levies upon employers based upon the size of their payrolls.[71] These levies, in turn, are composed of three elements: variable levies related to the costs of on-the-job injuries of workers in each of 103 separate industrial activity classes; flat rate levies related to non-work injuries of all earners in all industrial classes; and a flat rate to fund the Industrial Safety, Health and Welfare programme of the Department of Labour.

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[62] Accident Compensation Act, 1982, § 80(4).

[63] *Id.* § 81. The expenses covered must be "reasonable by New Zealand standards." *Id.*

[64] *Id.* § 82(a).

[65] *Id.* § 82(b).

[66] UNINTENTIONAL INJURY, *supra* note 21, at 55.

[67] Accident Compensation Act, 1982, §§ 38-46.

[68] *Id.* §§ 47, 48.

[69] REPORT OF THE ACCIDENT COMPENSATION CORPORATION FOR THE YEAR ENDED 31 MARCH 1987, 9 (1987) [hereinafter 1987 ACC ANNUAL REPORT].

[70] For each of the five years from 1982 through 1987, work accidents accounted for approximately 56 percent and non-work accidents for about 44 percent of costs of accidents to earners (not considering accidents involving motor vehicles). *Id.*

[71] Only leviable earnings are considered. That is, since the maximum earnings which any earner can consider for purposes of earnings related compensation was, in 1987, $64,458 per year, earnings of an earner in excess of that amount were not considered in computing the amount of payroll subject to levy. *Id.* at 22.

For 1988-89, levy rates were set from a low of $1.30 to a high of $27.25 per hundred dollars of payroll.[72] While self-employed persons had been paying a flat rate levy which, in June, 1987, amounted to $3.75 per one hundred dollars of earnings,[73] they, too, are now being assessed according to the class of industrial activity in which their work falls.[74]

It is particularly important to note, for the purposes of this article, that levies for the earners account, *which becomes the sole source of Compo benefits for all earners who suffer accidents* (other than those involving a motor vehicle,) are paid by employers based upon the size of their payrolls. While levies for work-based accidents are related to the accident cost experience of each of the 103 classes of industrial activity, there is no necessary relationship between the amount of the levy paid or the levy rate, on the one hand, and the accident-causing propensities of the particular employer, either with respect to his own employees or to third persons, on the other. A particularly stark example is the levy paid by physicians, which in the 1988-89 levy structure was set at $1.45 per one hundred dollars of payroll.[75] This is the same rate as that paid by employers of teachers.[76] Obviously, there is no attempt to charge physicians—or anyone else—with the costs of injuries, through negligence or otherwise, *that they may cause to those who are not their employees.*

The second largest source of funding, covering about twenty-one percent of the total costs of Compo,[77] is the motor vehicle account. This account covers injuries to victims of all accidents involving motor vehicles, whether work-connected or not. Each motor vehicle owner is required to pay a levy as part of the annual vehicle registration fee. As of November, 1987, the levies were either $25.30 for small motorcycles, tractors, and vintage motor cars, for example, or $100 for automobiles, busses and other larger vehicles.[78] While the Accident Compensation Act authorizes levies on motor vehicle drivers,[79] that authority has so far not been used.[80]

The supplementary account covers injury costs from accidents, other than those involving motor vehicles, suffered by non-earners. This account also covers costs of accidents to visitors to New Zealand.[81] These costs are paid by the

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[72] *See* ACCIDENT COMPENSATION CORPORATION, A GUIDE TO THE 1988/89 ACC LEVY STRUCTURE 15-17 (1988) [hereinafter GUIDE TO ACC LEVY STRUCTURE].

[73] *Id.* at 23.

[74] *Id.* at 13.

[75] *Id.* at 33.

[76] *Id.* at 25.

[77] 1987 ACC ANNUAL REPORT, *supra* note 69, at 9.

[78] UNINTENTIONAL INJURY, *supra* note 21, at 24, 25.

[79] Accident Compensation Act, 1982, § 49.

[80] SECOND WOODHOUSE REPORT, *supra* note 30, para. 239.

[81] Visitors are not entitled to recover ERC. UNINTENTIONAL INJURY, *supra* note 21, at 26.

government from general tax revenues.[82]

B. *Goals and Policies of Compo*

Rt. Hon. Sir Owen Woodhouse, the distinguished New Zealand judge who may rightly be called the father of Compo, insists that Compo is not an insurance scheme, but a program of social insurance.[83] In order to assess the success or failure of the system, or to compare it with other systems, it is necessary to identify and to discuss in more detail the specific goals sought to be achieved. These goals or objectives have been admirably set forth from the beginning of Compo.[84] They continue to receive support from those in governmental power.[85] They are:

1. *Community Responsibility.* This principle involves a recognition that it is in the national interest to recognize an obligation in the entire society to protect all citizens "from the burden of sudden individual losses when their ability to contribute to the general welfare by their work has been interrupted by physical incapacity."[86]

It is evident that this obligation, as it has been described, does not end with compensation to those whose ability to contribute has been interrupted by injury by accident; it extends equally to those who cannot contribute because of incapacity caused by illness, as well. In its current form, however, as described above, Compo only covers some industrial diseases.[87] The decision to concentrate on accidental injuries was evidently a pragmatic one. While recognizing that the scheme ought to benefit those incapacitated by illness, and hoping that it would one day be so extended, the framers of Compo considered economic factors—including the costs of covering all incapacity and the belief that the costs of the former tort/liability insurance system could go a long way to finance Compo for accident victims[88]—in their decision to limit coverage principally to accidents.[89] However, as time passes since the coming into force of the

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[82] *Id.* at 25, 26.

[83] SECOND WOODHOUSE REPORT, *supra* note 30, para. 44.

[84] *See* WOODHOUSE REPORT, *supra* note 10, paras. 55-63.

[85] *See, e.g.*, the Terms of Reference for the Law Commission's most recent report, SECOND WOODHOUSE REPORT, *supra* note 30, at viii. *See also* J. CHAPMAN, J. GOURLEY, P. JONES, J. MARTIN, V. MOREL & D. SMITH, 1 REVIEW BY OFFICIALS COMMITTEE OF THE ACCIDENT COMPENSATION SCHEME, 2-3 (1986) [hereinafter REVIEW BY OFFICIALS COMMITTEE] (Introductory Letter of Submission).

[86] WOODHOUSE REPORT, *supra* note 10, para. 55.

[87] Accident Compensation Act, 1982, §§ 27-29.

[88] *See* WOODHOUSE REPORT, *supra* note 10, paras. 461-465.

[89] *See id.* at 113-14.

original Act[90] and the memory of the fault system and the underlying tradeoff fades, the anomaly of providing generous benefits for accident victims and only minimal subsistence benefits for illness victims becomes more apparent and creates more pressure for modifying Compo to accommodate all incapacitated victims of accident and illness.[91] No one has put it better than Geoffrey Palmer:

> Is it possible or desirable to restrict earnings-related benefits to accidental injury alone? If the injury being compensated were work-related injury only, the distinction might be easier to make. But twenty-four hour cover for all injury brings up starkly the distinction with sickness and disease. How can the man with cancer be treated less generously than the man who was hurt in a motor accident? It is hard to find a persuasive argument against the proposition that people with similar incapacities should be treated the same way whether the origin of their trouble was accident or disease, including congenital incapacity.[92]

2. *Comprehensive Entitlement.* This principle refers to the goal of providing compensation to all injured persons "on the same uniform method of assessment, regardless of the causes which gave rise to their injuries."[93] The intent here was to reject basing the right to compensation on proof of fault or upon other compensation systems, such as workers' compensation, which distinguished among the causes for incapacity.[94] Again, this goal, as well as goal 1, above, might have embraced incapacity by illness as well as by accidental injury.

3. *Complete Rehabilitation.* This principle requires going beyond mere restoration of economic losses of incapacity "to encourage every injured worker to recover the maximum degree of bodily health and vocational utility in a minimum of time."[95] The adoption of this goal also reflected a criticism of the dynamics and delays of the fault system, which had been alleged to encourage

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[90] The original Act came into force in 1974. It was enacted in 1972. SECOND WOODHOUSE REPORT, *supra* note 30, para. 1.

[91] *Cf.* SECOND WOODHOUSE REPORT, *supra* note 30, paras. 6, 7.

[92] G. PALMER, ACCIDENT COMPENSATION, *supra* note 3, at 327. Questions might also be raised as to whether capable persons who are unable to find work, through the "accident" of adverse economic conditions or plant closings, are not equally deserving of compensation under this principle. *See also id.* at 328; J. STAPLETON, *supra* note 3, at 180-83; and Hide & Ackroyd, *Liability and the Control of Hazardous Technology*, 1988 N.Z.L.J. 277, 278 ("[I]f the community is to be responsible for those who are incapacitated, that responsibility should arguably be placed directly with all taxpayers; and if the aim is comprehensive entitlement, that cover should arguably be extended to include all incapacity, whether it is the result of accident or illness. *The logical policy for community provision of comprehensive cover for incapacity is a taxpayer funded minimum wage.*") (emphasis added).

[93] WOODHOUSE REPORT, *supra* note 10, para. 55.

[94] *Id.* para. 42.

[95] *Id.* para. 58.

malingering and to discourage rehabilitation.[96]

One particularly interesting manifestation of this principle is the provision in the current Act,[97] which mandates that once the ACC has assessed a person as permanently disabled, his or her ERC cannot thereafter be reduced "by reason of any increase in his earning capacity."[98]

4. *Real Compensation.* This principle mainly requires that the level of compensation be based on the goal of income maintenance—actual earnings—rather than on the social welfare approach of minimum subsistence. It also encompasses "recognition of the plain fact that any permanent bodily impairment is a loss in itself *regardless of its effect on earning capacity.*"[99] The latter point provides support for the very expensive proposition that compensation for noneconomic losses is justified in addition to ERC.[100]

5. *Administrative Efficiency.* The adoption of this goal also reflected dissatisfaction with the fault system. "It looks to evenness and method in every aspect of assessment, adjudication, and administration. The collection of funds and their distribution as benefits should be handled speedily, consistently, economically, and without contention."[101] In practice, however, the beneficial effect of providing benefits promptly and without "hassle" seems to have been accompanied by a loss of control over what in fact is being paid for. Thus, for example, relying upon physicians to determine whether their patients' conditions are produced by accident or illness for purposes of determining whether to pay medical expenses largely removes that important question from the ACC's control.[102] It may also have contributed to the failure to collect reliable data on accidents.[103]

6. *Accident Prevention.* Although not included among the five guiding principles of Compo, promotion of safety is made a matter of "prime importance" in the Accident Compensation Act[104] as well as in the report of the Royal Commission, the Woodhouse Report,[105] which led to the Act's adoption in the first place. Indeed, as between prevention, rehabilitation, and compensation, the Woodhouse Report stated that prevention was "[t]he most important"[106] and that "[a]ny modern compensation scheme must have a branch concerned solely with safety. Effective education, adequate inspection, and firm enforcement

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[96] *See id.* paras. 124, 170-171, 399-404.

[97] *See supra* text accompanying note 24.

[98] Accident Compensation Act, 1982, § 60(5).

[99] WOODHOUSE REPORT, *supra* note 10, para. 55 (emphasis added).

[100] *See* SECOND WOODHOUSE REPORT, *supra* note 30, paras. 188-194.

[101] WOODHOUSE REPORT, *supra* note 10, para. 62.

[102] *See* SECOND WOODHOUSE REPORT, *supra* note 30, para. 179 (recognizing that maintaining a the distinction between injury and illness was "one incentive for abuse").

[103] *See infra* text accompanying notes 233-34.

[104] Accident Compensation Act, 1982, § 35.

[105] WOODHOUSE REPORT, *supra* note 10, para. 2.

[106] *Id.*

must all be backed up by the allocation of funds and the stimulus of central direction."[107] The role of the ACC in promoting safety is therefore explicitly provided for in the Act.[108] Unfortunately, the ACC has not succeeded in fulfilling its role as a promoter of safety.[109]

C. *The Goals and Policies of the Tort Liability System*

The goals and policies of the common law system for dealing with personal injury accidents have, until recently,[110] rarely been clearly articulated or agreed-upon by the common law judges who participated in the creation and evolution of the system. Instead, such goals and policies have more often been discovered after the fact by scholars[111] and great judges[112] who have reviewed the past in a search for likely rationales. By now, however, many policies which the tort system actually serve or ought to serve have been identified and debated.[113]

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[107] *Id.* para. 3.

[108] The ACC Compensation Act states that, "[i]t shall be a matter of prime importance for the Corporation to take an active and co-ordinating role in the promotion of safety in all the different areas where accidents can occur in New Zealand." Accident Compensation Act, 1982, § 35(1). Additionally, subsection 4 provides:

> The functions of the Corporation in relation to the promotion of safety shall include—
> (a) Stimulating and maintaining interest in safety and the prevention of personal injury by accident:
> (b) Publishing and disseminating safety literature and information:
> (c) Sponsoring, assisting, and conducting safety campaigns, exhibitions, and courses:
> (d) Sponsoring, supporting, and fostering organisations and groups concerned with safety and the prevention of personal injury by accident:
> (e) Researching into causes, incidence, costs, and methods of prevention of personal injury by accident:
> (f) Determining the requirements in respect of, and providing or arranging for provision to be made for, the adequate recording of statistical information concerning personal injury by accident:
> (g) Seeking continuously for new ways to reduce the number and severity of accidents and personal injuries in all fields.

Id. § 35 (4).

Section 40 of the Act provides for safety incentives by way of bonuses and penalties on levies payable by employers and self-employed persons.

[109] *See infra* text accompanying notes 188-246. Other goals and sub-goals of the scheme will be mentioned in the text where relevant.

[110] *See, e.g.*, Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

[111] *See, e.g.*, W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS, ch. 1 (5th ed. 1984).

[112] *See, e.g.*, O.W. HOLMES, THE COMMON LAW 77-110 (1881).

[113] Most of these have been discussed in THE SPECIAL COMMITTEE ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF

In this article the focus is mainly upon the policies of accident prevention and deterrence, since these are the objectives I assert are seriously overlooked in New Zealand under Compo. It is of course widely understood that accidents and their costs cannot be *eliminated* without interfering unreasonably with the beneficial aspects of society. Instead, the appropriate goal is to *optimize* accident costs—to achieve the most "efficient" level of accident costs.[114] Tort law arguably achieves prevention either by direct or general deterrence. Under direct or specific deterrence, the fear of sanctions—large tort damage awards, increases in the price of liability insurance, or both—lead actors to make cost-efficient decisions conducive to safety. Under general deterrence placing the costs of inefficient accidents on the activities that caused them will cause the price of those activities to rise to reflect their accident costs. The consequence is (or is believed to be) that in a free market, the rate of consumption of activities will be significantly effected by price, with the consumption of unsafe activities reduced in relation to the consumption of safer activities. Conversely, removing the accident costs from the price of an activity—"externalizing" accident costs—will bring about an inefficiently high level of participation in that activity.[115]

Another form of deterrence, other than through economic incentives, has been well described by Professor Nesson: "Society attempts, through the judgments of its courts, to project a behavioral message that will influence individual's conduct."[116] This influence operates not only by bringing home to the actor the consequences of his conduct but, more importantly, by sending messages about what conduct the law disapproves the law "serves a moralizing, educative function . . . ." which results in an assimilation of preferred behavioral norms.[117]

SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW—REPORT TO THE AMERICAN BAR ASSOCIATION 4-1 to -157 (1984). They include reduction of the occurrence and severity, of injury-causing events; optimizing of the level of risky activity; protecting entitlements; compensation; responsiveness to the dynamic nature of an increasingly technological society; dealing with disputes arising out of a system of mass production and distribution; spreading of risk and of loss; a response to the ability of actors to control the activities and lives of others; providing relatively clear standards of conduct; serving justice, fairness, and morality; and punishment and retribution. *Id.*

[114] G. CALABRESI, THE COSTS OF ACCIDENTS (1970). With respect to the New Zealand scheme, Calabresi's thesis is discussed in G. PALMER, ACCIDENT COMPENSATION, *supra* note 3, at 362-63, 366, and Palmer, *Dangerous Products and the Consumer in New Zealand*, 1975 N.Z.L.J. 366, 375-77. *See also* Swan, *The Economics of Law: Economic Imperialism in Negligence Law, No-Fault Insurance, Occupational Licensing and Criminology?*, AUSTL. ECON. REV., 3rd Qtr., 1984, at 92.

[115] *See* sources cited *supra* note 114. *See also* R. POSNER, ECONOMIC ANALYSIS OF LAW §§ 4.2-4.15 (1973).

[116] Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1359 (1985).

[117] *Id.* at 1359-60. *See also* Galanter, *Beyond the Litigation Panic*, 37 PROC. ACAD. POL. SCI. 18, 29 (1988) ("[I]n addition to its direct provision of compensation [the tort system] supports a

Since Compo has largely externalized accident costs[118] and currently proposed legislation purports to move to even greater externalization,[119] the issue of deterrence seems to be the most immediate and relevant policy issue to discuss in appraising differences between the two systems. Only if it appears that there is no significant difference in deterrence or accident prevention outcomes under the two systems would it become worthwhile to evaluate the worthiness of the other policies of tort law.

Of course, if the systems are to be compared on the basis of accident prevention and deterrence, the costs of accidents must not be ignored. If as a result of Compo's deletion of tort liability the rate and severity of accidents have increased over what they otherwise would have been, then the increased costs of accidents should either be charged to Compo or subtracted from the costs of the tort liability system.[120]

Perhaps there is another facet of tort law which though seldom identified as a policy of the law is nevertheless an important feature of it, particularly with regard to the issues discussed here. *The system of tort law is self-invoking and application of safety norms is largely effected through private negotiations in which the coercive elements of governmental power serve mainly as an incentive to private resolution.* Victims under the system are given a strong motivation to have their accidents evaluated and, if determined by a lawyer probably to have been caused by a tort, to proceed with their claims.[121] Thus, individuals and entities,

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vast system of bargaining in which almost all disputes are resolved by negotiation and . . . stimulates a host of preventive activities by threatening and educating those engaged in the various activities that underlie injuries and disputes."). *But cf.* Sugarman, *supra* note 9, at 611-13 (asserting that arguments for the moralizing or educating function of tort law are unconvincing).

As to the beneficial deterrent effect of tort law in the health care context, *See* Bennett, *The Advantage of Malpractice Suits*, TRIAL, Sept. 1988, at 20, (reprinted from the N.Y. TIMES MAGAZINE, July 24, 1988) ("[T]he malpractice system almost certainly costs less, by deterring negligent care, than it saves." *Id.* at 72, col. 3) (Bennett is the editor of the Harvard Medical School Health Letter); Halberstam, *The Doctor's New Dilemma—"Will I Be Sued?"*, N.Y. TIMES MAGAZINE, Feb. 14, 1971, at 8, ("The abuses of the present system [of tort liability] are great, but on the whole it probably has done more good than harm, for court action remains one of the few ways of enforcing discipline and improving the standards of careless doctors.").

[118] *See infra* text accompanying notes 182-84.

[119] *See infra* text accompanying notes 311-50.

[120] *See* R. POSNER, *supra* note 115. As noted by Richard Posner:

> If compensation is the only purpose of the negligence system, it is a poor system, being both costly and incomplete. Its economic function, however, is not compensation, but deterrence of noncost-justified accidents. If the system yields substantial savings in accident costs, the heavy administrative costs of the system, which relate primarily to the determination of liability—the determination whether the accident was uneconomical—may well be justified.

Id. at 84.

[121] *See* Galanter, *supra* note 117.

through their self-interest—rather than an army of paid regulators and inspectors—act to achieve the deterrence goals of tort law.[122] In comparing Compo with tort law, therefore, the relative costs of enforcement also need to be included in the calculus. If a reduction in accidents under a pure no-fault system like Compo can only be achieved by establishing comprehensive regulatory and administrative structures, then the costs of these structures should be charged to Compo in determining the relative costs of the two systems.[123]

Since it is my view that the abolition of the personal injury action has led to a serious failure of accident prevention, it is appropriate now to examine the "crisis" of 1986-87 and its causes.

III. THE "CRISIS" AND ITS CAUSES

A. *Increases in Levies*

On December 19, 1986 an Order in Council[124] which rivalled Scrooge in its meanness announced very substantial increases in the levies employers would have to pay to the ACC for the forthcoming year to fund the earners account.[125] Individual increases, according to the class of industrial activity into which the employer fell, ranged from 120 percent to 537 percent. For employers, the average increase was 192 percent; for the self-employed, 265 percent.[126] In addition, the government added an additional eight cents per hundred dollars of payroll in order to fund the Industrial Safety, Health and Welfare Pro-

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The motivation would seem to be much greater in a jurisdiction where the contingent fee system is permitted and widely used and where the winning party's attorney's fees are not routinely charged to the loser, like the United States, than in one in which neither is the case, like New Zealand and Great Britain. Indeed, as has already been suggested, *see supra* note 10, the absence of these features in New Zealand may be the reason why doing away with the tort system may not have had any profound effect on the rate of accidents there.

[122] Less calculable from an economic standpoint, but perhaps equally important from the viewpoint of human dignity, is, first, the likely increase in bribery as a device for avoiding detection if the principle mode of accident prevention becomes one of administrative inspection and regulation. Second, even more threatening are the potential problems of civil liberties which may arise if accident prevention outside of the arena of industrial safety is achieved by use of inspectors or public interest groups who must necessarily intrude into areas, such as rented homes and public areas of private businesses, where potential safety problems may arise in order to gather information for invoking regulatory prescriptions.

[123] Of course, the converse is also true: Since the tort system only compensates tort victims, and even then only to the extent that their tortfeasors are insured or are able to pay, the cost of more complete compensation must be considered before a fair comparison can be made with Compo.

[124] Order in Council, 1986/380 (Dec. 19, 1986).

[125] *See supra* text accompanying notes 69-76.

[126] 1987 ACC ANNUAL REPORT, *supra* note 69, at 9.

gramme of the Department of Labour.[127] The new levies ran from a low of $1.20 per $100 of payroll to $27.85. These increases in the levies for the earners account followed on the heels of a new rate, announced in July 1, 1986, for the motor vehicle account—$43.10 per vehicle—which was roughly twice the rate for the prior year.[128]

As a result of these increases employers and employer groups complained vociferously and organized to resist paying the new and higher levies.[129] In response, labor leaders threatened retaliation with "industrial action"[130] if em-

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[127] *Id.* To make matters worse, all levies are subject to a ten percent Goods and Services Tax (GST). GUIDE TO ACC LEVY STRUCTURE, *supra* note 72, at 12.

[128] Order in Council, 1986/93 (May 19, 1986). If Compo were available in the United States this levy would in effect substitute for the need to purchase liability insurance for bodily injury, personal injury protection in a system which has adopted no-fault, medical payments coverage, and uninsured motorist coverage. It would not eliminate the need for property damage liability, collision insurance, and comprehensive coverage.

The motor vehicle levy more than doubled again in November, 1987, rising to $100 per motor vehicle. UNINTENTIONAL INJURY, *supra* note 21, at 24-25. This compares with the author's six month automobile insurance premium to Government Employers Insurance Company of $249.40 for Bodily Injury Liability ($300,000 limits), $70.60 for Basic Personal Injury Protection of $15,000 (no-fault), and $14 for Uninsured Motorist Coverage, for a total of U.S.$668 for the year commencing December 6, 1988, more than one year after the quoted levy.

[129] Dominion (Wellington, N.Z.), June 13, 1987, at 6, col. 5 (letter from small business owner complaining of 300 per cent increase in levies); *id.* June 4, 1987, at 7, col. 4 ("Compo hailed as model for world"; article says ACC will start legal proceedings against employers who refuse to pay levies; mentions meat industry association as one of the groups of employers threatening to boycott the levy increase); *id.* June 2, 1987, at 2, col. 7 ("Compo 'cheapest in world'; article discusses response of officer of ACC who is also national secretary of the Harbour Workers Union to plans of some employers to boycott the payment of levies); *id.* May 28, 1987, at 1, col. 1 ("Levy boycott predicted"); *id.* May 26, 1987, at 10, col. 1 (Editorial: "Breaking the Law"; comments on the proposed defiance of the Meat Industry Association to pay higher levies); *id.* May 22, 1987; McCulloch, *Levy stand risks compo—Rodger*, *id.* at 3, col. 7 (report of assertion by government minister in charge of Compo that payments of accident compensation may be at risk if other employers follow the lead of the meat industry in refusing to pay increases in levies); *id.* May 20, 1987, at 8, col. 1 (report that president of the Institute of Directors "has expressed concern that many businesses may not be able to afford an increase in . . . levies."); *id.* May 12, 1987, at 2, col. 4 ("The Manufacturers Federation has called for an urgent overhaul of the [ACC]"); Otago Daily Times, Mar. 25, 1987, at 16, col. 7 (reports comments by member of parliament to the effect that employers' complaints about large increases in levies are justified); Keenan, *Shearing levy rise opposed*, Dominion (Wellington, N.Z.), Mar. 13, 1987, at 16, col. 4 (reports that sheep shearing contractors will refuse to pay increases in ACC levies which were announced in December, 1986).

[130] Dominion (Wellington, N.Z.), May 30, 1987, at 3, col. 2 ("Four days left for employers to pay levy"; reports: "The Federation of Labour has already told employers that any attempt to sabotage the accident compensation system would be met with an industrial response."); Managh, *Warning by FOL on Compo Sabotage*, *id.* May 27, 1987, at 3, col. 1 ("The Federation of Labour told employers yesterday any attempts to sabotage the accident compensation system would be met with industrial muscle."); McCulloch, *Unions criticise boycott of levy*, *id.* May 26, 1987, at 7,

ployers failed to pay the new levies. Labor was concerned because an employers' boycott could produce an inability on the part of the ACC to pay compensation to accident victims;[131] the ACC's reserve funds had been exhausted[132] and it had no clear right[133] or ability to borrow the funds that might be necessary.

Viewed in comparison to costs in other countries, however, the new rates were not terribly high. Levies for the earners account are paid in lieu of both workers' compensation and liability insurance for personal injury. If the rates were to be averaged for all industrial activities,[134] the average cost would have been only about $3.00 per $100 of payroll. This, as the Law Commission has noted, was not far out of line with workers' compensation premiums elsewhere.[135]

What upset the New Zealand employers, however, were the sudden and unexpected increases in the December, 1986 levies. As we have discovered in the United States, the best way to incur the wrath of insureds is to impose huge and unexpected increases in premiums.[136] That is what happened in New Zealand. The big difference there, however, was that unhappy levy payers could not blame the increases on lawyers and the tort system. Instead, they blamed it mainly on cheating by employees and on the fact that their levies were "unfairly" supporting off-work accidents, such as those incurred in the punishing game of rugby, as well as work-related accidents.[137]

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col. 1.

[131] McCulloch, *Levy stand risks compo—Rodger*, Dominion (Wellington, N.Z.), May 22, 1987, at 3, col. 7 (reports Stan Rodger, the minister responsible for Compo, as saying "there was no golden pool of money and if employers generally took the [Meat Industry] association's approach, [refusing to pay levy increases,] compensation payments were at risk.").

[132] *$95 million loan to stay afloat*, Dominion (Wellington, N.Z.), May 27, 1987, at 3, col. 1 (reports comments of ACC finance general manager that the ACC had borrowed $95 million to meet day-to-day expenditures and that its financial reserves were near zero).

[133] *See* Accident Compensation Act, 1982, § 9(6) (ACC can only borrow money and mortgage its property with the prior consent of the Minister of Finance.).

[134] Averaging is what is recommended in SECOND WOODHOUSE REPORT, *supra* note 30, paras. 250-266.

[135] *Id.* para. 248. Comparisons were drawn with rates in four Australian states.

[136] *Cf. The Manufactured Crisis*, 51 CONSUMER REP. 544, 544 (1986) ("The current liability-insurance crisis began . . . with skyrocketing premiums and cancellations of policies.").

[137] *Compo scheme attacked*, Dominion (Wellington, N.Z.), May 12, 1987, at 2, col. 4 (Reports that the Manufacturers Federation urged that "embarrassing and burdensome" lump sum payments be scrapped; that beneficiaries be made to pay minimum costs before making claims on Compo; that the cost of non-work accidents be spread "more evenly" through the community; and cost controls should be made more effective "by rigid criteria and minimum claim levels."); Hellaby, *Freezing workers 'abusing compo'*, *id.* Mar. 6, 1987, at 1, col. 2.

B. Articulated Causes of Increases

The immediate causes of the December, 1986 increases in levies were generally agreed to be a change in the method of funding Compo coupled with increases in its costs.

1. Changes in Funding Methods

Initially, Compo was intended to be fully funded by current levies. That is, each year levies were imposed sufficient to fund the benefits for all accidents arising the prior year for so long as the benefits had to be paid. Thus, for example, if a thirty-year old employee earning $2,000 per month were permanently and totally incapacitated in 1986, sufficient levies would have to be imposed on the next levy date to raise funds sufficient, when invested, to cover all Compo benefits—including $1,600 per month (80 percent of his earnings) plus periodic cost of living increases—for that employee until retirement. Such funding necessarily involved complex actuarial predictions. It also produced enormous reserves which were invested in order to produce the growth necessary to pay benefits each year as they became payable to prior years' victims.

In 1982 the system of funding was changed from full funding to current-cost financing, called—perhaps deceptively—"pay as you go."[138] Under current-cost financing only enough income need be produced each year to cover actual Compo costs for the following year with reserves sufficient to pay several extra months' expenditure.[139] While the reasons for the change may have been sound—reducing the costs and perhaps the unreliability of long-range actuarial predictions of the full cost of current accidents[140]—the manner in which the change was undertaken, plus substantial increases in Compo's costs, created a crisis of solvency and a consequent need for sharp increases in levies. Evidently, the 1982 decision to change to current-cost financing was accompanied by a parallel decision to use up the then large reserve produced by the fully-funded system by keeping levies very low or reducing them.[141] Unfortunately, heavy increases in the costs of Compo rapidly diminished the huge reserves and threatened to exhaust the system's funds. The response of the ACC was the

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[138] 1987 ACC ANNUAL REPORT, *supra* note 69, at 10, 11; UNINTENTIONAL INJURY, *supra* note 21, at 26.

[139] The ACC has determined that reserves equivalent to seven months expenditures are appropriate. GUIDE TO ACC LEVY STRUCTURE, *supra* note 72, at 9.

[140] *See* Address by Professor T.G. Ison, Accident Compensation in New Zealand—Future Options, Nov. 28, 1985, at 21, 22 (available in Faculty of Law Library, Victoria University of Wellington) [hereinafter Future Options].

[141] *Cf.* 1987 ACC ANNUAL REPORT, *supra* note 69, at 4.

Order in Council of December, 1986 that triggered the outcry.[142]

2. *Increases in Costs*

If it is assumed, as Professor Ison had suggested,[143] that the move from a fully-funded to a current-cost financed system was justified, then allowing the existing reserves—paid for by past levies—to run down and keeping levies artificially low until the reserves were exhausted, thus precipitating the need for a sharp increases, might have constituted poor strategy and bad politics but did not necessarily reflect a serious problem with Compo itself. However, the swiftness with which the reserves were used up suggested that Compo's costs were increasing at an alarming rate.

That there was a serious problem of escalating costs was the perception which led in early 1986 to the convening of a committee of officials by three government ministers[144] to conduct a review of the accident compensation scheme. According to the officials who drafted the report, "[t]his particular review was prompted by inequities in treatment of illness and accident disabled and concern about escalating costs of the present accident compensation scheme."[145]

In August, 1986 the Officials Committee submitted a lengthy report which warned:

> [T]he financial viability of the current scheme is open to question given the massive cost blow-out in compensation which has occurred. This has caused a much more rapid run-down of reserves than was originally forecast. To maintain the

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[142] The ACC claims:

> [I]f the part of the scheme funded by levies on employers had been on a pay-as-you-go basis with adequate reserves, the average rate of levy over recent years would have been as follows:
>
> Average Employer Levy per $100 of Payroll

Year	*Pay-as -you-go*	*Actual*
1984/85	0.97	0.74
1985/86	1.17	0.74
1986/87	1.54	0.77
1987/88	1.69*	2.25

*estimated

Id. at 11.

[143] Future Options, *supra* note 140, at 21, 22.

[144] Deputy Prime Minister G.W.R. Palmer, the Minister of Labour S.J. Rodger, and the Associate Minister of Finance D. Caygill. Geoffrey Palmer, the Deputy Prime Minister and now Minister of Justice, is a former law professor who has taught in the United States; he was involved in research which led to the adoption of Compo. *See* G. PALMER, ACCIDENT COMPENSATION, *supra* note 3, at 112.

[145] 1 REVIEW BY OFFICIALS COMMITTEE, *supra* note 85, at 1.

> current scheme at current levels will require substantial increases in levies each year. . . . The Committee is firmly of the opinion that the scheme cannot continue in its present form.[146]

The evidence of a "massive cost blow-out" was taken from the ACC's financial statements for the year ended March 31, 1986.[147] The data in these statements, illustrated in tables 1 through 5,[148] paint a dramatic picture of a system whose costs seem to have gone out of control. They show continuing large percentage increases each year since 1981 in compensation paid by ACC both for accidents occurring in prior years and for accidents occurring in the reporting year.

Table 1

COMPENSATION PAID BY YEAR IN MILLIONS
ANNUAL PERCENTAGE INCREASES IN
COMPENSATION PAID[149]

Total compensation (all accounts):

Prior Years' Claim	*Current Year's Claims*	*All Claims*
1988 Not Available	Not Available	$620 - 17%
1987 Not Available	Not Available	$531 - 28%
1986 $186 - 17.7%	$230 - 49.4%	$416 - 34%
1985 $158 - 29.6%	$154 - 20.3%	$312 - 20%
1984 $131 - 18.0%	$128 - 10.3%	$259 - 14%
1983 $111 - 32.0%	$116 - 39.8%	$227 - 36%
1982 $ 84 - not avail.	$ 83 - not avail.	$167 - 32%
Avg. % incr. - 24.3%	30.1%	25.9%

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[146] *Id.* at 3.

[147] ACCIDENT COMPENSATION CORPORATION, FINANCIAL STATEMENTS FOR THE YEAR ENDED 31 MARCH 1986 (1986) [hereinafter 1986 FINANCIAL STATEMENTS].

[148] *See infra*, pp. 47-51.

[149] 1986 FINANCIAL STATEMENTS, *supra* note 147, at 3; ACCIDENT COMPENSATION CORPORATION, ANNUAL REVIEW 33 (1988) [hereinafter 1988 ANNUAL REVIEW, The author requested financial statements for years after 1986 from ACC and received the 1988 ANNUAL REVIEW. Although that (very attractive and glossy) pamphlet contained financial statements, it did not categorize compensation payments by account nor separately report the costs of current year's accidents and past years' accidents in the manner of the document which contained financial statements for the year ended March 31, 1986. *Cf.* 1986 FINANCIAL STATEMENTS, *supra* note 147.

Table 2

COMPENSATION PAID BY YEAR IN MILLIONS
ANNUAL PERCENTAGE INCREASES IN COMPENSATION PAID[150]

Earners Account:

	Prior Years' Claim	*Current Year's Claims*	*All Claims*
1986	$120 - 23.7%	$150 - 45.7%	$273 - 36%
1985	$ 97 - 18.3%	$105 - 23.5%	$202 - 21%
1984	$ 82 - 5.1%	$ 85 - 2.4%	$167 - 4%
1983	$ 78 - 34.4%	$ 83 - 38.3%	$161 - 36%
1982	$ 58 - not avail.	$ 60 - not avail.	$118 - 30%
Avg. % incr.	- 20.4%	27.5%	25.4%

Table 3

COMPENSATION PAID BY YEAR IN MILLIONS
ANNUAL PERCENTAGE INCREASES IN COMPENSATION PAID[151]

Motor Vehicle Account:

	Prior Years' Claim	*Current Year's Claims*	*All Claims*
1986	$ 50 - 4.2%	$ 37 - 68.2%	$ 87 - 25%
1985	$ 48 - 20.0%	$ 22 - 15.8%	$ 70 - 19%
1984	$ 40 - 66.7%	$ 19 - 58.3%	$ 58 - 64%
1983	$ 24 - 26.3%	$ 12 - 33.3%	$ 36 - 29%
1982	$ 19 - not avail.	$ 9 - not avail.	$ 28 - 33%
Avg. % incr.	- 29.3%	43.9%	34%

Table 4

COMPENSATION PAID BY YEAR IN MILLIONS
ANNUAL PERCENTAGE INCREASES IN COMPENSATION PAID[152]

Supplementary Account:

	Prior Years' Claim	*Current Year's Claims*	*All Claims*
1986	$ 15 - 15.4%	$ 40 - 48.1%	$ 55 - 38%
1985	$ 13 - 44.4%	$ 27 - 11.1%	$ 40 - 21%
1984	$ 9 - 0.0%	$ 24 - 14.3%	$ 33 - 10%

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[150] 1986 FINANCIAL STATEMENTS, *supra* note 147, at 3.

[151] *Id.*

[152] 1986 FINANCIAL STATEMENTS, *supra* note 147, at 3.

1983	$ 9 - 28.6%	$ 21 - 50.0%	$ 30 - 43%
1982	$ 7 - not avail.	$ 14 - not avail.	$ 21 - 40%
Avg. % incr.	- 22.1%	30.9%	34.4%

C. Possible Causes of the Annual Increases in Costs

As Table 5 indicates, the annual increases in costs generally exceed by significant degree the increases in inflation rates in New Zealand for the reported years.[153]

Table 5

REAL COMPENSATION PAID AND ANNUAL PERCENTAGE INCREASES IN REAL COMPENSATION IN 1981 DOLLARS (in millions)[154]

	Prior Years' Claim	*Current Year's Claims*	*All Claims*
1987	$153 - 14.2%	$106 - 00.0%	$259 - 7.9%
1986	$134 - 24.1%	$106 - 11.6%	$240 - 18.2%
1985	$108 - 11.3%	$ 95 - 00.0%	$203 - 5.7%
1984	$ 97 - 14.1%	$ 95 - 6.7%	$192 - 10.3%
1983	$ 85 - 16.4%	$ 89 - 23.6%	$174 - 20.0%
1982	$ 73 - 23.7%	$ 72 - 5.9%	$145 - 14.2%
1981	$ 59 - not avail.	$ 68 - not avail.	$127 - n.a.
Avg. Increase:	17.3%	8.0%	12.7%
% Increase from 1981 to 1987:	159.3%	55.9%	103.9%

Arguably, real increases of the dimension there reported cannot continually be sustained, regardless of the source of funding, in a small nation suffering New Zealand's economic problems.[155]

The annual increase in real costs, which has been labeled "cost creep," is expected by the ACC to account for about 12.8 percent of the added expenditure for 1989 over 1988.[156] The ACC and others who support Compo have

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[153] *See* SECOND WOODHOUSE REPORT *supra* note 30, para. 85 ("Over the 4 year period from 1978 to 1982 the expenditure remained fairly constant when inflation is taken into account. But the next 4 years saw a real increase of 49% or about 12% per year, and 40% over just the past 3 years with almost half of that occurring between 1985 and 1986. The rate of increase between 1987 and 1988 is 10%."). *See also* GUIDE TO ACC LEVY STRUCTURE, *supra* note 72, at 10; 1988 ANNUAL REVIEW, *supra* note 149, at 28.

[154] SECOND WOODHOUSE REPORT, *supra* note 30. para. 87.

[155] *See infra* note 353.

[156] 1988 ANNUAL REVIEW, *supra* note 149, at 28 ("A disturbing feature is the excess of expenditure over the normally expected rate of inflation.").

been hard-pressed to find a full explanation for cost creep. Possible causes which have been identified by ACC include increases in the public's awareness of the availability of payments for noneconomic loss and increases in the size of the payments being made; increasing health care costs paid for by the ACC rather than the public health system, including greater use of private hospital treatment; "hidden unemployment," wherein workers who are partially disabled and receiving Compo payments and who (by virtue of New Zealand's poor economic climate) cannot find suitable alternative work continue to receive full weekly ERC; and increasing abuse of Compo, both as to possibly fraudulent claims and the payment of excessive and unnecessary medical claims.[157]

Although conceding that "[m]ajor questions about costs still remain,"[158] the Law Commission's recent report mentioned other possible causes of cost creep. Increases in the compensation paid to those who claimed compensation in earlier years, it noted, were a necessary result of the maturing of the scheme: each year it is necessary to continue to pay both ERC and medical benefits for victims injured in prior years, some of whom will continue to receive Compo until retirement. The build up of the numbers of persons receiving compensation was expected to take up to twenty years, with the largest annual increases occurring during the first twelve years or so.[159] According to the Commission: "Exactly that is happening."[160]

The Commission, however, did express concern about the possibility that some victims are being paid compensation for too long a period.[161] It also pointed to a change in the Act that allowed injured workers fit for light duties to continue to receive ERC without reduction for the amounts they were capable of earning if they could not find such work.[162]

Very substantial annual increases in lump sums for noneconomic loss were attributed by the Law Commission to higher awards allowed under the Act[163]

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[157] GUIDE TO ACC LEVY STRUCTURE, *supra* note 72, at 10.

[158] SECOND WOODHOUSE REPORT, *supra* note 30, para. 100.

[159] *Id.* para. 89.

[160] *Id.*

[161] *Id.* paras. 90, 93.

> [O]ne survey of a district comparing 1984 and 1987 suggests a near doubling of the proportion of persons receiving earnings related compensation for 44 weeks (from 3.3% to 6.1%); and other calculations and projections suggest an increase in the average number of days on earnings related compensation from 23.9 in 1982/83 to 32.1 in 1986/87. The process of making medical assessment may be a significant factor.

Id. para. 93.

[162] *Id.* para. 94.

[163] *Id.* paras. 95, 96. Effective in 1983 the maximum amount for permanent loss or impairment of bodily function was increased by $10,000, to $17,000. Accident Compensation Act, 1982, § 78.

and in some cases mandated by judicial decision,[164] an increase in the number of claims,[165] and the clearing up of a backlog of claims.[166]

Increases in medical payments for private hospital costs were attributed to "an increase in the volume of the services so provided,"[167] perhaps reflecting a preference by physicians and their patients for private accommodations over those provided by the public sector.[168] The Commission hinted that other increases in medical payments might be the result of overutilization in situations where the victim is not personally surcharged for use of the service, as in the case of medical specialists.[169]

The important question remained unanswered, however. Were increases in costs attributable to any extent to increases in accidents or their severity?

In my 1987 submission to the Law Commission I suggested that a failure of deterrence might constitute a significant factor in the "massive cost blow-out" identified by the Officials Committee.[170] The Law Commission's final report, entitled "Personal Injury: *Prevention* and Recovery,"[171] however, did not directly confront that possibility. Instead, the report first cited the conclusions of Professor Brown's article to the effect that the removal of tort liability for personal injury has not been shown to have an adverse effect on automobile accident rates.[172] After conceding that comparable statistics for other unintentional injuries are unavailable,[173] it then cited an OECD report of annual day's work lost due to ill health and rates of fatal injuries in industry[174] which, though evidently seriously underreporting the numbers of injuries,[175] nevertheless indicated no significant changes in the annual average of lost workdays in New Zealand between 1973 and 1983 and only small changes in the rates of fatal

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[164] SECOND WOODHOUSE REPORT, *supra* note 30, para. 96. *See, e.g., In re* Appleby, 5 N.Z.L.R. 99 (1985); Jones v. Accident Compensation Comm'n, 2 N.Z.L.R. 379 (1980) (lump sum awards for loss of amenities of life, for pain and suffering, and for disfigurement should not be scaled as a percentage of the total amount allowed (which has not increased with inflation) but awards should be based on the amount the court thinks is deserving and, if that amount exceeds the maximum, the maximum should be granted).

[165] SECOND WOODHOUSE REPORT, *supra* note 30, para. 95.

[166] *Id.*

[167] *Id.* para. 98.

[168] *Cf. supra* note 33 and accompanying text.

[169] As compared with using general practitioners, where the claimant was required to pay for a part of the service. SECOND WOODHOUSE REPORT, *supra* note 30, para. 97.

[170] *See supra* text accompanying note 146.

[171] SECOND WOODHOUSE REPORT, *supra* note 30 (emphasis in title added).

[172] Brown, *supra* note 3.

[173] SECOND WOODHOUSE REPORT, *supra* note 30, para. 80.

[174] *Id.* (citing OECD, MEASURING HEALTH CARE 1960-1983, EXPENDITURE, COSTS AND PERFORMANCE tables F.3, F.5(b) (1985)).

[175] SECOND WOODHOUSE REPORT, *supra* note 30, para. 80.

injuries among workers there during the last twenty years.[176] On this flimsy evidence the Commission then offered its opinion that it did not "see the alleged deterrent role of tort liability for such injuries as a significant factor."[177]

Moreover, after examining the costs data, the Commission expressed doubt that there had been a "massive cost blow-out," stating that to so suggest was, in its opinion, misleading.[178] Instead, the report noted that Compo was relatively inexpensive, amounting in 1987-88 to only 1.2 percent of gross domestic product while furnishing twenty-four hour protection at a cost of only sixty cents per person for protection from every kind of accident.[179]

Finally, the Commission's report made much of the fact that most of the annual increases, in real dollars, are attributable to continuing claims made for accidents which occurred in prior years. "There is very little real change in the amounts paid in each year for *new* claims—as there would be if the cost blow-out description were justified."[180]

It would appear, however, that the Law Commission did not really face up to the implications of the cited data. In the first place, the annual *real* increases in compensation for *new accidents* seem far from inconsequential. An average increase, after inflation, of eight percent per year, or an increase of almost fifty-six percent over a six year period—occurring more than ten years after the system was begun—cannot be attributed just to greater awareness of the existence of the system. Something else is obviously afoot and whatever it is—whether abuse of the system, an increase in accidents or their severity, or a combination of these—should not be so lightly dismissed. That an increase in real compensation for new accidents did not occur in two years of the six may be puzzling, but it emphasizes the size of the increases in the other four years. And certainly a more than doubling of the real costs of the entire system over a six year period qualifies for the epithet "massive cost blow-out."

Further, it is by no means clear that increases in the cost of compensation for prior years' accidents do not reflect a worsening accident experience. As the Commission itself notes, part of the increasing costs of prior years' accidents is attributable to "large increases in the numbers of people who are still receiving payments after three years."[181] Such increases may, of course, be attributable to

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[176] *Id.*

[177] *Id.* para. 81.

[178] *Id.* para. 16.

[179] *Id.* The report also noted that the New Zealand system accounts for a lower percentage of New Zealand's gross domestic product (1.2%) than the costs of the less comprehensive combination of third party motor vehicle insurance plus employer's liability insurance account for in relation to Australia's gross domestic product (1.7%). *Id.*

[180] *Id.* paras. 16, 87.

[181] *Id.* para. 90. The Report also noted a "relative increase in recent years of motor vehicle injuries (with their higher average cost)" but expressed doubt as to what weight to give to that

malingering (possibly produced by a shortage of jobs), but the more plausible cause is an increase in the seriousness of injuries, requiring a greater average period for recuperation and rehabilitation.

Compensation for prior years' accidents may also reflect increases in accidents or their severity if Compo payments for seriously injured persons are significantly delayed before regular payments are made or if they occur toward the end of the reporting year. Assume, for example, that an accident causing permanent and total incapacity occurs two months before the end of the ACC's reporting year and that payment of ERC, in the amount of $3,000 per month, does not begin until the beginning of the last month of the period. In such case, the statistics for the year of the accident would reflect, at most, payment for two months ($6,000) but the next year would include, under compensation paid for accidents in earlier years, a full year's compensation—$36,000.

Moreover, although Compo purports to be a comprehensive accident compensation system, its allegedly low costs do not fully reflect New Zealand's accidents. For persons who are killed outright but who leave no dependents nothing but funeral expenses are paid. Housewives and the elderly and visitors to New Zealand who are injured receive no ERC and children may never receive what their potential earning capacity might have provided had they not been injured. Earners whose incomes exceed the leviable amounts receive no ERC to compensate for lost earnings in excess of those amounts, and ACC pays no ERC for the first week of accidents. Further, a significant degree of externalization of accident costs occurs in the area of medical expenses, since a significant amount of medical treatment for accidents is provided through the social security system and not charged to the accident scheme at all.[182] Indeed, the Law Commission itself estimated that accident costs *equal to about half the amount paid by ACC are not borne by the accident compensation scheme.*[183] Its estimate of externalized costs, however, only included some of the earnings losses borne by employers and employees[184] and medical costs paid out of Health Vote, such as accident care in public hospitals, but not medical care privately paid for. Furthermore, the estimate does not include uncompensated losses of earning capacity of in-

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information. *Id.* This information could cast doubt on Professor Brown's findings that the advent of Compo has not produced an increase in automobile accidents. *Cf.* Brown, *supra* note 3, at 984-94. Professor Brown's figures ran only through 1980.

[182] Many New Zealanders carry private first party hospital and medical insurance because of the perceived inadequacies of the medical care provided through the Social Security System. It is not known to what extent such private insurance is used to cover the medical costs of accidents without any insurer's subrogation rights being exercised.

[183] SECOND WOODHOUSE REPORT, *supra* note 30, para. 226. *See also* 1 REVIEW BY OFFICIALS COMMITTEE, *supra* note 85, at 83 (cited by the Law Commission).

[184] Included were the first week of compensation and twenty percent of earners' salaries not paid as ERC; excluded was the amount of earnings of earners in excess of the maximum leviable amount. 1 REVIEW BY OFFICIALS COMMITTEE, *supra* note 85, at 83.

jured non-earners and injured visitors.

The relevance of the degree of externalization just described is this: If Compo were comprehensive in covering all accident costs, then the costs of the system would truly reflect the costs of New Zealand accidents including the rate of increases in accidents and in their severity. If that were the case, a per capita cost of sixty cents per person per day for all accidents would arguably reflect a reasonable level of accidents.[185] And in that event it would also be appropriate to focus, as the Law Commission has done, on the costs of Compo rather than on the actual rate and severity of accidents, since the former would accurately reflect the latter. To the extent that accident costs are not charged to Compo, however, the cost of Compo loses its relevance as a guide to the accident situation in New Zealand and to the relative safety of the society.

While accident statistics, such as they are, will be analyzed below, it is interesting to note here that in recent years annual claims have been increasing, as indicated in table 6, below, notwithstanding a levelling off or even a possible decline in the population.[186]

Table 6

ACC CLAIMS RECEIVED BY ACCOUNT (IN THOUSANDS) AND ANNUAL PERCENTAGE INCREASES[187]

Year	Total Claims		Earners Acc.		Motor Vehicle Acc.		Supp. Acc.	
1987	151	0.0%	n.a.	n.a.	n.a.	n.a	n.a.	n.a.
1986	151	-4.4%	115	0.9%	17	0.0%	17	-29.6%
1985	158	3.9%	114	4.6%	17	6.3%	27	- 3.6%
1984	153	6.3%	109	1.9%	16	33.3%	28	12.0%
1983	144	9.9%	107	9.2%	12	0.0%	25	19.0%
1982	131	1.6%	98	1.0%	12	0.0%	21	5.0%
Avge % incr:		2.8%		3.5%		7.9%		0.6%
Total % incr:		15.3%		17.3%		41.7%		-9.5%

It seems a fair conclusion, therefore, that not only does the cost data *not* foreclose the possibility of serious increases in accident rates and in severity of acci-

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[185] However, it is still not as inexpensive as it first appears. Sixty cents per day is, after all, $219 per year. For a family of four this amounts to $876 per year to cover only accidental injuries.

[186] Population of New Zealand grew from 3,113,000 in 1980 to 3,314,000 in 1987, reflecting an annual average growth rate of .9 percent. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1988, table 1378 (108th ed. 1987). When the author was in New Zealand, during the first half of 1987, he recalls seeing newspapers reports of annual declines in the population of 20,000 and 12,000 for the period 1985-87.

[187] 1986 FINANCIAL STATEMENTS, *supra* note 147, at 1; SECOND WOODHOUSE REPORT,, *supra* note 30, para. 84.

dents, but on the contrary the data gives warning that such increases may be a significant factor in the otherwise unexplained cost creep. The question remains whether there is any direct and convincing evidence of a failure of deterrence.

IV. DETERRENCE OF ACCIDENTS

A. Position of the Act and the ACC

Both the Accident Compensation Act and the Woodhouse Report which preceded it placed the highest priority on accident prevention, with rehabilitation second and compensation last.[188] As Professor Gellhorn has recently pointed out, however, "[t]he emphasis has been reversed in administrative reality."[189] While the Act authorizes the ACC to provide financial incentives, both penalties and bonuses, to employers or self-employeds with particularly bad or good safety records[190] and to impose penalty rates on drivers or classes of drivers with "significantly worse than average accident records,"[191] the ACC recently gave up its former very limited use of such financial incentives on employers[192] and has never surcharged bad drivers.[193] Notwithstanding the ACC's broad responsibilities and authority in the area of accident prevention,[194] the ACC only spent 1.2 percent, 1.1 percent, and .7 percent of its total annual expenditures on accident prevention during the years 1984 through 1986, the highest amount being $3,681,000 in 1985.[195] Aside from the safety bonuses in 1984 and 1985, the money was spent on financial grants to other organizations and other accident prevention services.[196] As noted in the *Review by Officials Committee*, "In the last few years, expenditure by A.C.C. on accident prevention has

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[188] Accident Compensation Act, 1982, § 26(1); WOODHOUSE REPORT, *supra* note 10, para. 2.

[189] Gellhorn, *supra* note 3, at 197.

[190] Accident Compensation Act, 1982, § 40. This section authorizes penalties not exceeding 100 percent and bonuses not exceeding 50 percent of annual levies.

[191] *Id.* § 49(e).

[192] $1,204,000 and $1,269,000 per year were awarded as safety incentive bonuses in the years ending March 31, 1984 and 1985, respectively. No penalties were assessed in those years and no bonuses were awarded in the year ending March 31, 1986. 1 REVIEW BY OFFICIALS COMMITTEE, *supra* note 85, at 115.

[193] SECOND WOODHOUSE REPORT, *supra* note 30, para. 140.

[194] Accident Compensation Act, 1982, § 35. *See supra* note 108 (listing the safety promotion functions of the ACC).

[195] 1 REVIEW OF OFFICIALS COMMITTEE, *supra* note 85, at 115. If safety bonuses are excluded, the percentages spent in the years ending March 31, 1984 and 1985 were 0.8 and 0.7, respectively. *Id.* These amounts and percentages, however, may not include about $3 million per annum to support a 40 person staff in the ACC Accident Prevention Branch. *Cf.* SECOND WOODHOUSE REPORT, *supra* note 30, para. 108.

[196] 1 REVIEW BY OFFICIALS COMMITTEE, *supra* note 85, at 115.

been declining both in real terms (total amounts in constant dollars) and as a percentage of total expenditure."[197] In general, the accident prevention activities of ACC seem to be focused mainly on supporting prevention activities of other groups; developing and running safety education campaigns, programs and courses; attempting to influence others to discover and to ameliorate hazardous conditions; cooperating with other national organizations and with local organizations, both public and private; and, in general, "[g]etting people to place a higher relative value on 'safety' in the continuum of factors that motivate their behavior."[198]

The only other source of deterrence in Compo is the levy structure itself. For the earners account, the rate for each industrial activity is, in part, based directly upon the past three year's payments of accident compensation by ACC to all the workers employed and injured in each such activity. This results in those companies engaged in industrial activities which have experienced the highest worker injury costs for on-the-job accidents paying the highest rates.[199] Unlike experience rating of individual firms under a workers' compensation system, in which each company's accident record may directly affect its insurance costs, an individual employer or self-employed under Compo can only reduce or increase its levy by influencing the accident record *of all employers engaged in the same industrial activity*. Thus, for example, a particularly careful employer engaged in aerial work operations will pay the same levy—$27.25 per $100 of payroll for 1988-89—as a particularly unsafe employer engaged in the same activity. Further, each employer pays the same flat-rate levy—$1.05 per $100 of payroll for 1988-89—to cover non-work-related accidents of all workers eligible for Compo in New Zealand.[200] Finally, there is no attempt whatsoever to relate levies to accidents caused by levy payers to third persons, such as one's customers, one's patients, one's lessees, or the consumers of one's products, who are not employees of the levy payer. Notwithstanding the elaboration of 103 levy classes of industrial activities, therefore, there is very little financial incentive for safety built into the current levy structure of the earners account.[201]

Similarly, there are virtually no safety incentives built into the levies for the motor vehicle account, since there are only two levy rates, one for small vehicles and one for large,[202] and accident costs of non-earners paid from the supple-

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[197] *Id.*

[198] UNINTENTIONAL INJURY, *supra* note 21, at 68-69.

[199] *Id.* "The corporation tries to make each class of industrial activity self-supporting in relation to funding for work injuries." *Id.*

[200] GUIDE TO ACC LEVY STRUCTURE, *supra* note 72, at 17.

[201] The Law Commission seems to agree. SECOND WOODHOUSE REPORT, *supra* note 30, paras. 137-139.

[202] As of November, 1987 the two rates were $25.30 and $100 per annum. Ordinary automobiles, motorcycles exceeding 60 c.c., buses, service coaches, "goods-service" vehicles, self-pro-

mentary account are entirely externalized since they are paid out of general tax revenues.[203]

While personal injury accident costs have thus been externalized, the common law system still flourishes in other areas. For example, actions at law for intentionally or negligently causing property damage may still be brought; and other actions, such as for malicious prosecution or conspiracy, also remain available so long as plaintiff seeks recovery for damages other than those produced by "injury by accident."[204] Moreover, common law actions for punitive damages may be brought to punish outrageous conduct, though the award must not be so large as to create an impression that plaintiff is being compensated for his injuries.[205] In addition, there may remain residual areas of medical malpractice liability, such as failure to diagnose illness and performance of surgical procedures without informed consent, which do not fall within the Act's definition of medical misadventure or injury by accident and in which a common law negligence action for resulting physical injuries may still be allowed.[206]

It follows, therefore, that whatever specific or general deterrents to accidents exists in New Zealand must come either from the availability of these residuary law actions or from other systems, such as the criminal law, administrative inspection and regulation, and disciplinary boards, which are not a part of Compo and which, from all that appears, are generally no more effective, and in some case considerably less effective, than similar systems, such as OSHA, professional disciplinary systems, safety commissions, and the like in the United States.[207]

The consequence of this is that those who can cause personal injury to others, whether they be firms or individuals and regardless of whether they are required

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pelled vans, and mobile cranes all paid the $100 rate. UNINTENTIONAL INJURY, *supra* note 21, at 24-25.

[203] *Id.* at 25.

[204] *Cf.* New Zealand Forest Prods. Ltd. v. Attorney General, 1 N.Z.L.R. 14 (1986) (action to recover economic losses for negligently cutting electric cable allowed). "The law of negligence has undergone a renaissance of recent years . . . ." *Id.* at 15; Auckland City Council v. Blundell, 1 N.Z.L.R. 732 (1986) (malicious prosecution and conspiracy). *See also* Love, *supra* note 3, at 976-77 and authorities there cited.

[205] Auckland City Council v. Blundell, 1 N.Z.L.R. 732 (1986); Donselaar v. Donselaar, 1 N.Z.L.R. 97 (1982).

[206] *See* Gellhorn, *supra* note 3, at 189-90; Vennell, *Informed Consent*, *supra* note 3. It is also not clear whether and to what extent non-industrial man-made diseases, negligently caused, are covered by Compo or might instead still be suable under the common law system. *See* J. STAPLETON, *supra* note 3, at 145 (asserting that under Compo "victims of man-made hazards such as environmental pollutants and non-medicinal products such as food, cosmetics, and other chemicals go uncompensated under the scheme. . . . [and] are relegated to what is usually the illusory remedy provided by tort").

[207] *See infra* notes 351-55 and accompanying text.

to pay levies, do not fear individually having to bear in any significant degree the increased costs of accidents they cause—whether through increased levies, judgments for damages for personal injuries, or increases in their liability insurance rates—or even losing liability insurance protection. Thus, as I noted in my submission to the Law Commission:[208]

> I suggest that the absence of liability for personal injuries in the case of product manufacturers and sellers, land owners and occupiers, health care providers, building contractors, public entities, and other actors may, as the awareness that there is no responsibility for personal injuries sinks home, lead to far greater hazards to the entire population. There is likely to be a temptation for the small-time landlord or business to put off costs of repairing unsafe conditions or disposing of hazardous materials or wastes. For the slumlord, there may be an irresistible temptation to capitalize on savings achieved by short-cutting safety. A similar problem may also exist with regard to that small percentage of every profession as to which a sense of personal responsibility coupled with professional discipline does not provide adequate deterrence. . . .
>
> Surely it seems excessively naive to argue that safety and accident prevention practices "are driven as much by a sense of responsibility to employees and the community at large, the protection of the organization's public image and a recognition of financial costs unrelated to accident compensation levies and penalties" as by financial incentives and penalties (i.e. loss of production, affect on employee morale, ability to attract suitable staff, cost of pay settlements, etc.).[209]

B. Personal Observation

Personal observations during New Zealand's summer, fall, and winter of 1987 established, at least to my satisfaction,[210] that disgracefully hazardous

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[208] Submission to Law Commission, *supra* note 14, at 5.

[209] 1 REVIEW BY OFFICIALS COMMITTEE, *supra* note 85, at 117.

[210] For a different perspective from a distinguished scholar whose stay in New Zealand coincided in part with the author's, see Gellhorn, *supra* note 3, at 197 (asserting that efforts to educate the public about safety hazards "have often been notably successful" and that "a visitor is struck by the extent to which workers, householders, athletes, and children have become accustomed to using protective devices such as headgear, breathing filters in dusty and fume-laden environments, and 'ear muffs' to reduce the impact of noise."). In addition to the inconsistent observations noted in the text, the author and his wife became particularly interested in rugby, a fast-moving physical contact sport accounting, in the year ended March 31, 1988, for 26 percent of New Zealand's 20,289 sports accidents (32.2 percent if Rugby League is included), 1988 ANNUAL REVIEW, *supra* note 149, fig. 8 (1988), and in which nothing resembling protective gear was anywhere in sight. Unlike American football, rugby players wear only shorts and jerseys and do not wear helmets or padding.

conditions[211] had become endemic to that beautiful nation. One needed only to walk around the City of Wellington for an hour or two to see many obvious conditions which seriously threatened both workers and passersby. These included widespread failures of construction workers to wear hard hats even in extremely dangerous situations; unfenced and unguarded hazards in busy downtown sidewalks, such as large and deep holes, pieces of equipment and dangerous items, including wire fencing and other construction debris, lying directly in the path of pedestrians; debris from demolished buildings heaped on unfenced construction sites and spilling onto adjacent sidewalks while children climbed on the rubble and adults searched for salvageable items; cranes lifting heavy objects directly over the heads of pedestrians and above moving automobile traffic; and a worker firing a "ramset" gun into a concrete walk within a few feet of passersby on the sidewalk.[212]

Further, large parts of the road system, particularly on the spectacular South Island, present dangerous challenges to the ordinary driver and especially to the visitor unaccustomed to such conditions.[213] The roads are narrow, often becoming single lane, clinging precariously to the sides of steep mountains with blind curves, with no guard rails, and often unsealed (unpaved) with new metal (freshly graveled) surfaces.

Admittedly, however, some of the hazards noted were not without offsetting and beneficial effects. Thus, for example, a used car salesman from whom I had purchased a car allowed me to use another car *without charge*—and without any corresponding benefit to the used car dealer—while my car was hors de combat in a repair garage unaffiliated with the car dealer. The first car so loaned was in dreadfully dangerous condition, with doors which flew open while driving around a rotary and water leaks which caused it to overheat and stall while driving up a steep hill. When I called the salesman to tell him about the problems he cheerfully invited me to return the first car and pick up another in better condition. In a more entrepreneurial vein, a farmer on magnificent Otago Peninsula, for a few dollars, allowed visitors to travel about ten kilometers over his farm—on a dangerous curvy and unpaved road—to view penguins and seals in their natural habitat. No warnings were given and no signs were posted alerting drivers to the formidable hazards which faced them on the road.

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[211] As compared to conditions in Japan, where the author had just completed a four and one-half month stay, and in Honolulu.

[212] The author submitted twenty-two photographs of hazards, taken during one or two short walks around the City of Wellington, to the Law Commission along with his submission. Slides made from the negatives are in the possession of the author.

[213] *See, e.g.*, *Thrills and spills for Asian travellers*, Dominion (Wellington, N.Z.), June 1, 1987, at 6, col. 7 (reporting a high rate of automobile accidents for Asian tourists and a call by a travel industry representative to improve road conditions and signposting of dangerous road conditions; the conditions were characterized as "nothing short of a national disgrace").

It is doubtful whether hazards such as these would be allowed to exist for long in a liability insurance-conscious nation like the United States. Their continued though not unremarked[214] existence in New Zealand does suggest that accident deterrence has failed there, probably because there is no meaningful sanction should the hazards actually produce the accidents they threaten. As suggested above, however, effective deterrence may on occasion eliminate some beneficial aspects of dangerous conduct which the absence of fear of liability might encourage.[215]

C. *Newspaper Reports*

While these personal observations of unsafe conditions are admittedly anecdotal, they are buttressed convincingly by contemporaneous newspaper reports. The editorial verse in the style of A.A. Milne quoted at the beginning of this article,[216] for example, seems to confirm rather forcefully my perception of the seriousness of hazards created by construction in Wellington. In addition, newspaper articles culled on a fairly regular basis reveal serious problems of safety in many other areas as well. In addition to construction hazards[217] these include

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[214] *See infra* notes 216-28.

[215] Perhaps similar outcomes could be produced in the United States by broadening the defense of implied assumption of risk. Whether such hazards, though beneficial in other respects, should be tolerated is another question. These cases do illustrate the point that the tort liability system may in some circumstances deter useful activities. *See generally* Olson, *Overdeterrence and the Problem of Comparative Risk*, 37 PROC. ACAD. POL. SCI. 42 (1988). For a view that Americans have an obsession that life should be risk-free and that the obsession "is one of the most debilitating influences in America today," see Fairlie, *Fear of Living—America's Morbid Aversion to Risk*, NEW REPUBLIC, Jan. 23, 1989, at 14. *But see* Correspondence, *id.* Mar. 13, 1989, at 6, 42. *See also* P. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988) (an articulate polemic charging recent developments in tort law with inhibiting valuable advancements in science and technology and calling for greater return to contractual arrangements). *But cf.* Galanter, *Beyond the Litigation Panic*, 37 PROC. ACAD. POL. SCI. 18 (1988).

To the extent that overdeterrence occurs, its costs should be considered a cost of the tort liability system when that system is compared with other systems.

[216] *See supra* text accompanying note 1.

[217] Cross, *Walkers dodge falling debris*, Dominion (Wellington, N.Z.), Sept. 30, 1987, at 6, col. 2 ("Falling debris from Wellington building sites continues to pose hazards to pedestrians. . . . Inspectors were doing their best, but regulations and supervision could not stop accidents."); Menzies, Letter to the Editor, *id.* July 16, 1987, col. 3 (describing observed work situation where two workers on planks working about eight stories above the street were unprotected by scaffolding or safety rails, and "where the slightest loss of balance would have sent either of the two men to the pavement and certain death," and stating "[t]his incident was the worse of several I have observed around the city lately. Not only workers but also members of the public are being put at risk unnecessarily."); Victoria University of Wellington, News VUW, May 22, 1987, at 24 ("[C]rane topples in early May to block Culliford Drive.", the road adjacent to the University, with picture); *Inspector considers sites unsafe*, Dominion (Wellington, N.Z.),

problems of highway and driver safety,[218] fire and other hazards in high-rise buildings,[219] unsafe drugs administered to children,[220] excessive electrical acci-

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May 13, 1987, at 6, col. 6 (report of Labour Department official's statement: "A shortage of construction safety inspectors, combined with construction company pressure on workers to get buildings up quickly, meant many labourers worked in hazardous conditions . . . ."); *id.* May 8, 1987, at 7, col. 4 ("The Labour Department will send a "very stiff" warning to an Auckland building company after a wall collapsed and injured a carpenter.").

[218] Bishop, *Drivers do well in alcohol blitz*, Dominion (Wellington, N.Z.), July 20, 1987, at 3, col. 1 ("Few drivers mixed alcohol with driving . . . but 'alarming' figures were reported for the South Island."); *Death rate on roads not so gloomy, id.* June 26, 1987, at 3, col. 8 (original report that New Zealand's road accident death rate was the worst of eight nations surveyed was wrong; correct death rate for every 10 million kilometers traveled was 26 deaths rather than 37, thus putting New Zealand behind Germany (34) but ahead of Australia and Japan (24 each), Canada (23), the United Kingdom (21), Sweden (17), and the United States (15)); *Licensing revamp set for August, id.* June 11, 1987, at 3, col. 7 (announcement of plans for a "tough new licensing system for young drivers" designed to reduce the accident rate among drivers aged 15 to 24); *id.* at 16, col. 4 ("The attitudes of New Zealand drivers have deteriorated," according to retiring Ministry of Transport senior sergeant.); *Thrills and Spills for Asian Travellers, id.* June 1, 1987, at 6, col. 7.

[219] *Fire study begun*, Dominion (Wellington, N.Z.), July 18, 1987, at 3, col. 5 (report of Internal Affairs Minister asking the Building Industry Commission to examine need for fire sprinklers in high rise buildings); *Doubts cast on highrise safety, id.* July 12, 1987, at 1, col. 1 ("Many of the highrise towers being built in New Zealand could have structural faults serious enough to cast doubts on their safety, two senior Ministry of Works and Development staff say."); Vasil, *Sprinkler review likely—Tapsell, id.* July 11, 1987, at 3 (report that Internal Affairs Minister was likely to seek a review of existing sprinkler requirements); Vasil, *Insurers firm on sprinklers, id.* July 10, 1987, at 3, col. 7; *Law tougher abroad, id.* col. 8 ("New Zealand's requirement for sprinkler systems only in buildings higher than 14 stories is less stringent than in other Western countries."); Moran, *Backing for sprinkler bylaw urged, id.* July 8, 1987, at 3, col. 7; Editorial, *Waiting for a tragedy, id.* July 7, 1987, at 10, col. 1; Vasil, *Tourists' call for sprinklers heeded, id.* July 7, 1987, at 3, col. 1 ("Refusal by some overseas tourists and employees of large international companies to stay in hotels without sprinkler systems has prompted one Wellington chain to install them."); *High fire risk areas extended, id.* ("The Fire Service Commission has included hospitals and the chemical industry as high fire risk areas where sprinklers systems should be mandatory."); Vasil, *Hotel chief defends fire safety, id.* July 6, 1987, at 3, col. 7 (includes report that the Dominion revealed that most of Wellington's leading hotels were "unprotected throughout" by sprinkler systems, and that the chief executive of the Hotel Association asserted that the standard of fire safety in New Zealand hotels was nevertheless adequate); *Use of sprinklers supported, id.* col. 3 (owner of Wellington's second largest hotel agrees that all hotels should be required to have sprinklers systems).

[220] Editorial, *Uncertainty on vaccines*, Dominion (Wellington, N.Z.), July 15, 1987, at 10, col. 1 (Editorial asks: "Are New Zealand children being used as guinea pigs?" after noting conflicting reports on whether the meningitis vaccine administered to children after an outbreak of the disease was adequately tested.); Vasil, *Illnesses unrelated to vaccine, id.* at 1, col. 5 (report that Health Department investigators found no evidence that "minor side effects such as vomiting, fainting and a sensation of rubbery legs" were caused by vaccine rather than by the immunization process and that the Health Department "was not unduly worried about the immunisation programme and would continue with it unless long-term side-effects were proven"); *50 calls report*

dents,[221] risks from hazardous substances,[222] excessive recreational accidents,[223] excessive back injuries,[224] high rates of fatalities among bush (forest) workers,[225] problems of incompetent hospital treatment or other malpractice,[226] in-

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vaccine ills, *id.* July 14, 1987, at 3, col. 3 (reports of 50 calls to South Auckland Health Department of side effects of meningitis vaccine including vomiting and "having trouble walking"); *Vaccine to stay but inquiry planned*, *id.* July 13, 1987, at 6, col. 5; *Injection reactions kept from parents*, *id.* July 6, 1987, at 1, col. 5 ("The Health Department says it did not publicise the adverse reactions of 25 children to meningitis vaccination injections . . . because it did not want to threaten the campaign.").

[221] Dominion (Wellington, N.Z.), July 21, 1987, at 3, col. 1 ("Auckland Electric Power Board has called for a special report on fatal accidents involving its linesmen, three of whom have died this year."); Raea, *Electrical accidents kill nine people*, *id.* June 13, 1987, at 7, col. 1.

[222] Managh, *Transport firms act to reduce accidents*, Dominion (Wellington, N.Z.), June 8, 1987, at 3, col. 1 (report on efforts by the transport industry to reduce accidents from hazardous substances carried by road).

[223] *Ski field safety defended*, Dominion (Wellington, N.Z.), July 20, 1987, at 3, col. 3 (report of Turoa ski field public relations officials answering complaints in two letters to newspaper about safety measures taken at ski field); *Concern at rate of water deaths*, *id.* July 6, 1987, at 6, col. 8 ("New Zealand has one of the worst drowning records in the Western world," according to the Internal Affairs Minister. "Whatever excuses are advanced for reluctance to fence home swimming pools, there can be no argument with statistics that prove that such pools are attractive—and deadly dangerous—to toddlers."); *Most cycle accidents unreported*, *id.* June 11, 1987, at 3, col. 8 ("A 1984 survey showed the chance of a cyclist dying on the road was three times higher in New Zealand than it was in Britain."); *Rugby's ACC use defended*, *id.* ("World Cup rugby organisers are annoyed at an inference that the [ACC] may be footing a heavy bill for injuries to players involved in the tournament."); *Third accident at show injures youth*, *id.* May 12, 1987, at 6, col. 3.

[224] *Bad backs 'a worry'*, Dominion (Wellington, N.Z.), June 26, 1987, at 6, col. 5; *Back injury tops safety concern list*, *id.* May 4, 1987, at 3, col. 6 ("A survey by Wellington's trade union health and safety centre has identified back injuries as the number one workplace helth [sic] hazard . . . .").

[225] Managh, *Statistics highlight bush work dangers*, Dominion (Wellington, N.Z.), Apr. 30, 1987, at 3, col. 3 ("Bush workers have been killed in site accidents at a rate averaging almost one a month for the past 18 years, Labour Department figures show.").

[226] *Surgeon on suspension*, Dominion (Wellington, N.Z.), July 16, 1987, at 3, col. 1 (report relating to charges that orthopedic services at Whakatane Hospital had been causing unnecessary medical problems, including the death of a patient); *Doctors' discipline procedures for review*, *id.* July 13, 1987, at 1, col. 7 (report that "mounting pressure for change within and without the profession" has led the Medical Council to consider revising disciplinary procedures to make them "responsive, accessible and free of financial burden for taxpayers and complainants"); Letter to the Editor, *id.* June 21, 1987, at 10, col. 6 (writer complains that as a "medical victim" she has no recourse against her physician but is "ironically seen in the statistics as an 'accident victim' "); *100 complaints about treatment*, *id.* May 8, 1987, at 1, col. 7 ("Almost 100 people have complained . . . about the care they received at Whakatane Hospital."); *Month's wait for full orthopedic inquiry*, *id.*, May 1, 1987, at 9, col. 1 (solicitor for family whose son allegedly died as a result of malpractice after he entered hospital with fracture, "has compiled a list of between 40 and 50 people who claim to have had bad experiences at the hospital's orthopedic department.")

dustrial safety problems,[227] and, of major national concern, the possibility that physicians who diagnosed symptoms of cervical cancer in women had experimentally denied them treatment.[228]

It is of course not possible to present a clear correlation between the absence of tort liability and the reported incidence of accidents. Nevertheless, many of these situations—such as New Zealand's alleged high rate of water deaths produced in part by the failure of homeowners with swimming pools to fence in their pools[229] or an excessively relaxed attitude by physicians to certain kinds of evidence of cervical cancer,[230] for example—lend themselves rather plausibly to the explanation that the absence of any perceived tort sanction, whether of personal liability for damages, an increase in insurance premiums, or even being subjected to an action for civil liability, has created an "I don't give a damn" attitude toward risk of harm to others.

While essentially anecdotal like my personal observations, this evidence is also buttressed by statistics furnished by the ACC.

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[227] Meares, *Industrial hazards under scrutiny*, Dominion (Wellington, N.Z.), July 2, 1987, at 12, col. 7 (report includes assertion that, because workers fear losing their jobs, far more industrial accidents occur than ever get reported).

[228] *See* Committee of Inquiry into Allegations Concerning Treatment of Cervical Cancer at National Women's Hospital and Other Related Matters, *Public notice*, N.Z. Herald (Auckland), July 25, 1987, at 4, col. 1; Meares & McQuade, *Cancer inquiry fears*, Dominion (Wellington, N.Z.), July 20, 1987, at 1, col. 1 (report on problems of reaching women in a public investigation of charges that many women diagnosed with signs of cervical cancer were deliberately not treated during a twenty year "experiment"); *Doctor guilty of misconduct*, *id.* June 26, 1987, at 3, col. 7 ("A doctor who failed to diagnose cervical cancer in a patient has been found guilty of professional misconduct."); *Hospital inquiry fund set up*, *id.* June 14, 1987, at 3, col. 3 (fund established to help women who want to testify); Main, *Report on cancer treatment awaited*, *id.* June 5, 1987, at 3, col. 1 ("The government may begin an independent inquiry into the treatment of cervical cancer patients at the National Women's Hospital in Auckland."); *Cancer allegations disputed*, *id.* June 8, 1987, at 3, col. 8 (Cancer society medical director reported to admit that some physicians at National Women's Hospital "questioned the value of cervical screening" but that "as far as he was aware" the problem was limited to that hospital).

Women who believe they were victimized by the failure to treat their cervical cancers are seeking to bring law actions for damage. However, they must await the determination of the ACC as to whether their rights lie under Compo or in law actions for damages. Letter from John Miller, Senior Lecturer, Faculty of Law, Victoria University of Wellington, to Richard S. Miller (Nov. 25, 1988).

[229] *See supra* note 223.

[230] *See supra* note 228.

D. Accident Statistics

1. Deficiencies of Statistics

As part of the total scheme of Compo the ACC, and before it the Accident Compensation Commission, was charged, in furtherance of its accident prevention function, to engage in research "into causes, incidence, costs, and methods of prevention of personal injury by accident."[231] Unfortunately, notwithstanding high hopes expressed in the Woodhouse Report that the accident compensation scheme would overcome prior deficiencies in accident statistics and lead to the development of "a statistical picture unlikely to exist in the same detail in any other country,"[232] the effectiveness of accident intelligence-gathering has been a major disappointment.[233] Evidently, the gathering of statistics has taken a back seat to the receiving of claims and prompt paying of compensation.[234]

2. The Statistics

Nevertheless, the ACC has published accident statistics and those statistics, though they may be of questionable accuracy and completeness,[235] do seem to

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[231] Accident Compensation Act, 1982, § 35(4)(e).

[232] WOODHOUSE REPORT, *supra* note 10, paras. 319-322.

[233] *See* SECOND WOODHOUSE REPORT, *supra* note 30, paras. 99, 125-126, 281-282 ("To apply the words used 20 years ago by the Royal Commission, the statistical record for injuries is still incomplete and even misleading." *Id.* para. 281; 1 REVIEW BY OFFICIALS COMMITTEE, *supra* note 85, at 120 ("In our review of the accident compensation scheme, there was frequently some difficulty in obtaining appropriate statistical data to support or disprove various comments and opinions. This is of particular concern in the safety and accident prevention area . . . . Not all accidents are reported . . . . Even accidents reported lack full information in a significant number of cases."); G. PALMER, ACCIDENT COMPENSATION, *supra* note 3, at 392-93.

[234] SECOND WOODHOUSE REPORT, *supra* note 30, §§ 5, 126. This may represent a misguided application of the general principle of administrative efficiency, wherein claims are paid without hassle upon a general certification by a physician that they arose from accident without monitoring the accuracy of the certificates as to coverage and as to correctness of the physician's diagnosis or prognosis.

[235] The ACC stated:

> Data on injuries are compiled from certificates given by medical practitioners at the time each claim is made. Therefore, diagnoses must strictly be regarded as preliminary ones—although, obviously, most will not be expected to change. . . . The system of bulk-billing by medical practitioners means that most medical fees paid by the Corporation do not involve the registration of a claim.

ACCIDENT COMPENSATION CORPORATION, 2 ACC STATISTICS, NO. 1, 30 (1983) [hereinafter 2 ACC STATISTICS].

See also ACCIDENT COMPENSATION CORPORATION, 4 ACC STATISTICS, 36 (1985) [hereinafter 4 ACC STATISTICS]. As to the statistics for 1988, the ACC states:

> The statistics largely exclude those accidents resulting only in (1) incapacity during the

support the anecdotal evidence that the incidence and severity of accidents has been increasing significantly. Thus, for example, between 1981 and 1983, head injuries were reported to increase from 18,762 to 22,954, or by 22.3 percent; fractures increased from 10,315 to 12,522, or by 21.3 percent, and perhaps most frightening of all from the perspective of accident costs to ACC and human tragedy, spine fractures with cord lesion increased from 15 to 74, or by 393.3 percent.[236]

Unfortunately, accident statistics furnished to me for the year ended March 31, 1988[237] do not appear to be directly comparable to the statistics for 1981 and 1983 earlier published. Nor are they as detailed. Nevertheless, some rough comparisons are possible: A total of 22,954 compensated head accidents of all kinds was reported for 1983;[238] for 1988 the total of head accidents reported was 28,081,[239] a 22.4 percent increase. A total of 1,259 compensated eye or eye orbit accidents was reported for 1983;[240] for 1988 a total of 1,217,[241] representing a decrease of 3.3 percent, although it is not clear whether eye injuries reported for 1988 also include injuries to the orbit, as they did in 1983. The total of neck injuries reported in 1983 was 2,001[242] as compared to 2,574 in 1988,[243] an 18.6 percent increase. In 1983, a total of 14,973 compensated back or spine injuries were reported;[244] the total for 1988 was 18,864,[245] repre-

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first week (for which the Corporation is not liable) or (ii) medical treatment (for which the doctor is normally reimbursed direct [sic]). However, they do include those cases where compensation has been paid for dental treatment—which must be claimed for by the patient.

In addition, they also exclude accidents (even fatal ones) to non-earners unless compensation has been paid . . . . This applies to children and elderly people in particular.

It is estimated that about half of all lost-time work accidents may be excluded by the above provisions; how many non-work accidents are so excluded cannot be reliably estimated.

The circumstances of each accident are as reported by the claimant. Injuries are as diagnosed by medical practitioners at the time the claims were made, and some diagnoses may therefore not be final.

ACCIDENT COMPENSATION CORPORATION, COMPENSATED ACCIDENTS FOR THE YEAR ENDED 31 MARCH 1988 1 (1988) (unpublished) [hereinafter COMPENSATED ACCIDENTS FOR 1988].

[236] *Compare* 2 ACC STATISTICS, *supra* note 235, 30-31, *with* 4 ACC STATISTICS, *supra* note 235 at 36-37.

[237] COMPENSATED ACCIDENTS FOR 1988, *supra* note 235.

[238] 4 ACC STATISTICS, *supra* note 235, at 36.

[239] COMPENSATED ACCIDENTS FOR 1988, *supra* note 235, table 8.

[240] 4 ACC STATISTICS, *supra* note 235, at 37.

[241] COMPENSATED ACCIDENTS FOR 1988, *supra* note 235, table 8.

[242] 4 ACC STATISTICS, *supra* note 235, at 37.

[243] COMPENSATED ACCIDENTS FOR 1988, *supra* note 235, table 8.

[244] 4 ACC STATISTICS, *supra* note 235, at 37.

[245] COMPENSATED ACCIDENTS FOR 1988, *supra* note 235, table 8.

senting an increase of 26 percent.[246]

There do not seem to have been any sharp increases in population, employment, in the hazards of employment, or in recreational activities in New Zealand during the reporting period which could account for such sharp increases in serious injuries. The only remaining explanations for the increases are (1) that the figures supplied to the ACC by physicians, or the figures as published, are inaccurate or not comparable from one reporting period to the next, (2) that although the data may be accurate, more citizens have become aware of the availability of Compo and a higher percentage of accidents are resulting in claims and more fraudulent claims are being filed, (3) that a significantly more dangerous environment has indeed produced a shocking increase in serious accidents, or (4) a mix of the above.

E. Conclusions Regarding Deterrence

When the implications of the cost data—especially the otherwise unexplained "cost creep"—are considered in connection with the anecdotal evidence gathered by personal observation, the many newspaper reports—including some explicit reports of New Zealand's high accident rate in relation to other nations—and the available statistics provided by ACC, it is hard to avoid concluding that Compo's "cost creep" or its "cost blow-out" has been caused mainly by an "accident blow-out." When to this evidence is added the intuition as well as the theory that removing direct financial incentives on individuals and firms to avoid accidents and removing the costs of accidents from the activities which cause them will result in an inefficient level of accidents, then the conclusion that the absence of deterrence such as that produced by the tort system has indeed resulted in an unacceptably high and inefficient level of accidents seems proved by at least a preponderance of the evidence. If I am correct in this, then the Accident Compensation Scheme, notwithstanding its humane values and its success at providing compensation, is tragically flawed.

V. REFORMING THE SYSTEM

A. Problems Perceived

It was not specifically the problem of accidents or failure of deterrence but rather escalating costs, as described above, coupled with a continuing desire to

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[246] In 1983, 13,048, or 87.1 percent, of the 14,973 reported back or spine injuries were sprains or strains. 2 ACC STATISTICS, *supra* note 235, at 37. Comparable statistics were not available to the author for 1988. *See* COMPENSATED ACCIDENTS FOR 1988, *supra* note 235, table 8.

reduce the disparity of treatment between those disabled by accident and those disabled by other causes that generated reconsideration of the Accident Compensation Scheme by three impressive governmental bodies—the Officials Committee,[247] The Royal Commission on Social Policy,[248] and the Law Commission.[249] Since the Law Commission has produced a draft bill—the Safety, Rehabilitation and Compensation Act[250]—which would entirely replace the Accident Compensation Act of 1982, and since there is a fair chance that the Law Commission's report will become the starting place for discussions leading to a new compensation act for New Zealand,[251] the principal focus of discussion here will be the Law Commission's final report and the manner in which it deals with the problem of accidents.

Owen Woodhouse, the distinguished jurist responsible for the original report which eventually gave rise to Compo, served as the President of the Law Commission during the recent study which led to the current recommendations for a new Act.[252] Well before the final report emerged, in May, 1988, he had signalled his intention of dealing with the immediate problem of increasing costs and levies by eliminating differential rates for the 103 categories of industrial activity and moving toward a uniform flat rate for all employers.[253] It was therefore no surprise when the final report included a recommendation for a flat rate levy for employers and self-employed persons.[254]

The problem for the Law Commission, however, was not just to deal with employer complaints of excessively high levies, although that was obviously a promising way of cooling the political heat that had generated most of the governmental concern about the Scheme. The broader issue was how, in the

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[247] *See* 1 REVIEW BY OFFICIALS COMMITTEE, *supra* note 85; *see also* 2 REVIEW BY OFFICIALS COMMITTEE, *supra* note 85 (Introductory Letter of Submission).

[248] See references to the work of the Royal Commission on Social Policy, including six working papers, in SECOND WOODHOUSE REPORT, *supra* note 30, §§ 7, 14, 37, 57, 60, 63, 64, 163, 184, 186, 273.

[249] SECOND WOODHOUSE REPORT, *supra* note 30. Since Sir Owen Woodhouse, the author of the original Woodhouse Report, is President of the Law Commission, this report has been referred to here as the Second Woodhouse Report.

[250] *Id.* at 104-95.

[251] *See* letter from John Miller, *supra* note 228.

[252] In an interview given to the National Business Review (New Zealand), Sir Owen himself questioned whether it was "sensible" to place him in charge of assessing the scheme of which he was the architect. *See* Herbert, *Compo payments relief on the way*, Nat'l Bus. Rev., June 26, 1987, at 1, col. 2.

[253] *Id.* In Sir Owen's view, the levies, while in the form of a payroll tax, are "indirectly a sales tax as the cost is passed on to the general public in prices." *Id.* at 5, col. 5. Further, he holds the view that the preferred approach would be to finance the system out of general taxation. *Id.* This is of course consistent with the view that Compo is a social insurance scheme. *See* SECOND WOODHOUSE REPORT, *supra* note 30, paras. 2, 44-46.

[254] *See* SECOND WOODHOUSE REPORT, *supra* note 30, para. 21.

face of escalating costs, including the unexplained "cost creep" described above,[255] to maintain the original guiding principles of the Scheme which included relatively rich levels of compensation—"real compensation"—and in addition to broaden coverage to eliminate the anomalous difference in treatment between accident victims and other disableds—comprehensive entitlement—, while not complicating the administration of the Scheme—administrative efficiency—and while dealing appropriately with the supposed highest priority of all, accident prevention.[256]

B. *Options Available to the Law Commission*

If these objectives were to be met, a combination of some of the following options would have to be adopted:

1. *Reduce amount of benefits paid.* Total benefits could be reduced by (a) eliminating lump sum payments for noneconomic loss, which had recently experienced a meteoric increase;[257] (b) reducing weekly benefit levels of ERC by reducing the percentage (now eighty percent)[258] of weekly earnings paid or reducing the maximum amount of annual income on which ERC would be paid ($63,458);[259] (c) extending the length of the period of non-coverage for ERC beyond the current one week waiting period;[260] (d) shifting entirely or partly from income maintenance[261] to minimum subsistence; (e) reducing dependent's benefits[262] and some of the miscellaneous benefits;[263] (f) reducing false and fraudulent claims for ERC by workers; (g) monitoring physicians effectively to insure the correctness of determinations that patients' conditions were caused by accident rather than by non-covered conditions and that private hospital stays were necessary: and (g), most importantly, by reducing the number and severity of accidents.

2. *Increase income.* Possibilities included (a) extending levies beyond motor vehicle owners, employers, and self-employeds and imposing them on groups and individuals currently exempt, such as athletes and athletic groups, motor

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[255] *See supra* text accompanying notes 157-80.

[256] *See supra* note 189.

[257] Noneconomic loss paid increased from $56.9 million in 1985 to $88 million in 1986, a 55 percent increase. The payment in 1986 for noneconomic loss constituted 21.1 percent of the total of $416 million paid as compensation by the ACC in 1986. 1986 FINANCIAL STATEMENTS, *supra* note 147, at 3, 5.

[258] Accident Compensation Act, 1982, §§ 59(1), 60(1)(e).

[259] UNINTENTIONAL INJURY, *supra* note 21, at 22 (as of June, 1987).

[260] Accident Compensation Act, 1982, § 57.

[261] *See, e.g.*, Accident Compensation Act, 1982, §§ 59(1), 60(1).

[262] *Id.* § 65.

[263] *See, e.g., id.* §§ 72, 73, 77, 80.

vehicle drivers, workers, owners and occupiers of real property; (b) requiring beneficiaries or potential beneficiaries to contribute to the scheme, as by imposing monthly charges on workers, requiring patient contributions to medical and drug expenses, or levying a Compo tax on visitors to New Zealand; (c) imposing general or specific (as on gasoline) tax increases to support greater contributions from general tax revenues (d) experience rating—surcharging existing levy payers and assessing and imposing levies on others based upon the extent to which they cause accidents to others, as with drivers, occupiers of property, products manufacturers, and health care providers; (e) raising money through fines or penalties imposed on activities found to be violating safety standards; and (f), the most controversial proposal, reinstating the tort action in whole or part and allowing the ACC to recover the value of ACC payments from tortfeasors whose acts or omissions caused the accidents which led to such payments.

3. *Improve accident prevention.* Here the possibilities include (a) improving safety education and safety programs; (b) expanding specific deterrence through increased direct regulation of accident-causing activities coupled with fines, penalties, and imprisonment in appropriate situations; (c) expanding use of financial incentives such as bonuses for good safety records and penalties for poor safety records, and, for victims, longer waiting periods for commencement of benefits and requiring self insurance; and (d) improving general deterrence by requiring internalization of accident costs—through experience rating, by imposing a part or greater part of the costs of accidents on accident causers, such as employers in the case of work-related accidents and victims where there is contributory fault, or the reimposition of tort liability in whole or part. It should be noted that the last three possibilities for increasing income, (d) - (f) in paragraph 2, above, generally coincide with the last three possibilities for improving accident prevention, (b) through (d), in this paragraph.

C. Recommendations of the Law Commission

Here, however, in broad brush strokes, are the principal changes which the Law Commission has actually recommended:

1. Benefits

a. *Waiting period extended.* The waiting period for Compo benefits should be extended from one week to two.[264] However, the obligation to pay ERC which now falls on the employer for the first week of incapacity in cases of

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[264] SECOND WOODHOUSE REPORT, *supra* note 30, para. 28(3).

work-related injury would be extended to the full two weeks.[265] The earner injured on the job would thus suffer no loss of benefits. but employees injured off the job would have to carry themselves for the second week if the employer did not provide sick pay for that week.[266] While the Law Commission makes fairly expansive claims for the degree of self-incentive on both employees and employers and the degree of individual responsibility this change will produce,[267] the actuarially estimated savings—about $26,000,000 per year[268]—seems minuscule in relation to the likely problems of costs. The Law Commission evidently rejected the recommendation of the Royal Commission on Social Policy that the waiting period be extended to four weeks.[269]

b. *Earnings Related Compensation for Permanent Disability.* The Law Commission rejected a proposal of the Royal Commission on Social Policy to drop periodic payments of earnings related compensation at their current high level after the second year of disability and then to begin to pay a reduced flat rate somewhat more generous than the current social welfare payment for those disabled by illness.[270] Instead the Law Commission recommends that if and when a cut is necessary in ERC payments, a uniform percentage, such as five percent, be adopted.[271] In the meantime, there would be no change in the commitment to pay generous ERC to disabled workers until retirement if necessary. Indeed, the draft act sets the new maximum monthly salary on which ERC payments (of eighty percent) are based at $2,000 per week.[272]

A dramatic change, however, is recommended for the treatment of disabled non-earners who will for the first time become entitled to periodic payments based upon New Zealand's average weekly earnings, as described in the next section.

c. *Lump Sum Payment for Noneconomic Loss.* Noting that lump sum payments for permanent disability and for loss of the amenities of life and for pain and suffering could not be justified if the scheme were to move in the direction of covering sickness as well as accident,[273] the Law Commission has proposed that, generally, lump sum awards for noneconomic loss be abolished.[274] However, in recognition of the fact that those who suffer serious disability "will often meet

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[265] *Id.*

[266] *Id.* paras. 183-185.

[267] *Id.* paras. 183-184.

[268] *Id.* para. 184.

[269] *Id.* (citing ROYAL COMMISSION ON SOCIAL POLICY, WORKING PAPERS ON INCOME MAINTENANCE AND TAXATION (Mar. 1988)).

[270] *Id.*

[271] *Id.* (would reduce ERC payments to 75 percent of weekly earnings).

[272] *Id.* at iii (erratum), 127.

[273] *Id.* para. 193.

[274] *Id.* paras. 188-194. The proposal would also eliminate lump sum awards to a spouse and children upon the death of a worker. *Id.* para. 42.

greater costs in various areas than the able,"[275] the Commission recommends permanent periodic payments for loss of capacity if the loss exceeds five percent.[276] The percentage of incapacity is to be determined by an authoritative schedule of the American Medical Association.[277] The percentage is to be applied to eighty percent of the "average weekly wage" which, the Commission states, is a base figure which is different from the individual's own historic earnings which constitutes the base figure for ERC and is based instead upon "a general figure which we have taken as the average wage,"[278] presumably for all of New Zealand. In an appropriate case these benefits may be computed to a lump sum.[279]

The proposed draft Act, borrowed in part from legislation introduced into the Australian Parliament in 1977,[280] purports to be less complicated than the existing legislation.[281] Unfortunately, however, it is unclear on the important question whether an earner who suffers incapacity will receive ERC and, *in addition*, a percentage, based on the AMA schedule, of average weekly earnings "for 'all sectors, all persons' " in New Zealand in lieu of current lump sums for noneconomic loss.[282] The implication is that *both* kinds of payments will be available to earners.[283]

This proposal constitutes the most significant improvement in benefits for

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[275] *Id.* para. 190.

[276] *Id.* para. 195.

[277] *Id.* (citing AMERICAN MEDICAL ASSOCIATION, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT (2d ed. 1984)).

[278] *Id.* para. 203. There is a provision for adjustment in the event of exceptional cases. *Id. See also* Draft Act, §§ 25(2), 48, *id.* at 119, 130, respectively.

[279] *Id.* §§ 131-132 (§ 52).

[280] *Id.* at 94 (appendix B) ("The model was the National Rehabilitation and Compensation Bill presented and read a first time in the House of Representatives of the Australian Parliament on 24 February 1977. . . adapted . . . to New Zealand circumstances.")

[281] *Id.* para. 23.

[282] *Id.* para. 29.

[283] *Cf. id.* paras. 29, 194, 201-203. *But cf. id.* at 99: "Clause 42 attributes to a person who has no earnings a national income. This is set at the amount of average weekly earnings (all sectors, all persons). *The provision applies to all those who are not employed or self-employed.* They will be entitled to a periodical benefit for total incapacity or permanent partial incapacity." (emphasis added). This last provision as well as the draft act seems to limit such benefits to non-earners. On the other hand, one of the examples given is of a worker who shatters his leg in a motorcycle accident and then receives periodic payments of $190 per week, based on permanent incapacity of 60 percent, which may last thirty-four years. This amount is then compared in the example with the $10,000 lump sum for noneconomic loss the worker would currently receive. Since an injured earner may currently receive a lump sum payment in addition to ERC, the implication is that earners *will* receive periodic benefits in addition to ERC. *Id.* para. 199. However, if the proposal actually contemplates removing lump sum payments for noneconomic losses for earners without replacing those benefits, there may be serious resistance from the labor movement.

nonearners who, under the current scheme, fare very poorly if they suffer long term serious disability, being entitled only to a lump sum up to a total of $27,000 plus medical expenses. While giving up the right to lump sum payments for noneconomic loss, they would now be entitled to received periodic payments based on a percentage impairment determined by a physician using the AMA schedule of impairments, the percentage to be applied against the all-New Zealand average weekly earnings. Such payments could continue until retirement age.

Actuaries have estimated that the allowance of such periodic payments in lieu of current lump sums would eventually—when the new scheme reaches its full maturity—cost about $403 million per year in 1987-88 dollars, as compared with $145.5 million which would be paid in lump sums under the current Act.[284]

d. *Extension of Coverage to Illness-Based Disability.* The Law Commission recommends that, in furtherance of the objective of comprehensiveness, the scheme be extended to cover, as included within the definition of personal injury, congenital diseases.[285] The proposal, however, was not included within the draft act on the ground that "the change is a major one with significant consequences for other areas of policy and administration" and because its costs have not been determined.[286]

e. *Medical Expenses.* The Commission recommends that medical treatment for accident victims and victims of illness and disease be treated equally.[287] This would be accomplished *by removing the obligation to cover such expenses from the Compo scheme* and turning the public responsibility over to the social welfare system by reference to the Social Security Act 1964.[288] However, to insure that

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[284] *Id.* para. 204. The report mentions the figure given but the actuaries who computed the costs, in their report, estimate 1987-88 payments of lump sums for noneconomic loss at $175 million. *Id.* para. 211.

These estimates may also include the cost of a provision designed specifically to permit sexual assault victims and others who suffer serious emotional harm or permanent disfigurement to receive periodic payments for disability by directing the physician who determines the percentage of disability to take into account the extent to which the condition "has permanently lessened that person's ability to lead a normal life." *Id.* para. 120 (Draft Bill § 27). There is also a provision which would permit periodic payments, such as these, to be commuted to a lump sum "where it is particularly advantageous and just to the beneficiary that the benefit be paid by way of lump-sum payment." *Id.* paras. 131-132 (Draft Bill § 52).

[285] *Id.* para. 172 (the proposal would be similar to that contained in the bill introduced in the Australian Parliament in 1977: A congenital disease was there defined as "a physical or mental defect, including a disease, in a person existing at or shortly before birth, being a defect or disease that becomes evident before that person attains the age of 3 years.").

[286] *Id.*

[287] *Id.* paras. 7, 176-179.

[288] *Id.* para. 176.

accident victims continue to receive appropriate health care the specific elements of "personal attention" to which such victims are entitled are spelled out in the draft Act.[289] The Law Commission also recommends that in order to create appropriate "incentives" and to further "individual responsibility" victims should ordinarily cover one-third of their own medical costs.[290] However, because of international labor conventions to which New Zealand is evidently bound, the employer would be required to pay the amount of medical expenses not covered by Compo for its employee if the accident or disease was work-related.[291] In addition, special provision for payment would be made to impose a ceiling on the amounts an individual would have to pay and for further assistance in the event the victim was unable to pay the residual amount.[292]

Although some incentives to avoid or prevent accidents are built in to the medical expense proposal—to the extent that individuals and employers have to bear medical expenses—it must be recognized that *the remaining costs of medical and surgical care and all other health costs would be externalized by this proposal*; they would be paid for under the social security system from general revenues. For 1987 these expenses accounted for about twenty percent of all ACC compensation costs.[293]

f. *Coverage*. The Law Commission recommends moving away from exclusive reference to a broad and general definition of what conditions are covered, such as the current "personal injury by accident" and "medical misadventure," to a schedule of specific covered outcomes which is capable of being changed as necessary. The recommended schedule, *Causes of Personal Injury*, is based in part on the International Classification of Diseases of the World Health Organization.[294] It omits reference to "accident" because of the intention to expand coverage to injuries or conditions not necessarily caused by accident.[295]

One of the major proposed effects of the change to a schedule would be that a limitation which the courts had placed on the term "medical misadventure," to the effect that a "recognized risk" of a particular therapy was not covered,

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[289] *Id.* para. 177 (Draft Act § 53).

[290] *Id.* para. 176. It is not clear whether the one-third victim's share includes hospital and surgical expenses as well as expenses of physician's individual medical treatment. The illustration used to justify this figure was taken from the experience with ACC payments for individual practitioner visits, which had evidently been about one-third less than usual fees. *Id.* para. 174. Evidently this practice of setting payments lower than usual fees has recently been struck down in the courts, which have required ACC to pay the full fee to the extent it is "reasonable by New Zealand standards."

[291] *Id.* para. 178.

[292] *Id.*

[293] *Id.* para. 175.

[294] *Id.* paras. 165-166. The "First Schedule" (so denominated to distinguish it from the table of Motor Vehicle Levy Rates, which is the Second Schedule) may be found *id.* paras. 166-194.

[295] *Id.* para. 166.

would be eliminated.[296] Further, getting or failing to get informed consent would "no longer be relevant," since if the particular outcome were included in the schedule the victim would be covered regardless of whether the patient had been informed of its possibility and had consented.[297]

Other changes recommended include omitting a limitations period (currently within one year from the date of the accident or the death)[298] and giving cover, not available under the current scheme, to incapacity manifesting itself after 1974 although caused before that date.[299] By way of example, this would furnish coverage for asbestos-related occupational disease caused by exposure prior to 1974,[300] for injuries which manifested themselves after 1974 but which were caused by pre-1974 accidents,[301] and for sexual abuse of a child which occurred prior to 1974 but for which the emotional harm appears thereafter.[302]

2. *Funding*

The Law Commission recommends changes in the manner in which Compo is funded by eliminating different rates of annual levy for employers and self-employeds engaged in different industrial activities and instead adopting a flat rate, estimated to be about $2.64 per $100 of payroll.[303] Experience rating of employers, self-employeds or of motor vehicle owners or drivers would *not* be attempted and provisions in the Act allowing bonuses and penalties would be removed.[304] Levies upon owners of motor vehicles would instead be based upon the current two-rate structure, $100 or $35.30, which is based largely on size of vehicle, and the levies would be adjusted in the future according to changes in

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[296] *Id.* para. 165.

[297] *Id.*

[298] Accident Compensation Act, 1982, § 98.

[299] SECOND WOODHOUSE REPORT, supra note 30 paras. 167-171.

[300] This provision would only extend the current coverage of occupational diseases. *See* Accident Compensation Act, 1982, § 28. The Law Commission did not recommend the extension of coverage of Compo generally to man-made non-occupational diseases, *See generally* SECOND WOODHOUSE REPORT, *supra* note 30, First Schedule at 166-95, although a few environmental hazards seem to be included. *See id.* at 172-74 (accidental poisoning by other solid and liquid substances, gases, and vapours), *id.* at 189 (exposures to radiation), *id.* 190 (exposure to Noise (pollution, sound waves, and supersonic waves). The failure adequately to cover man-made diseases has been criticized as a serious failure of both the tort system and New Zealand's Compo. *See* J. STAPLETON, *supra* note 3, at 145-50.

[301] The example given is of spinal accidents. SECOND WOODHOUSE REPORT, *supra* note 30, para. 167.

[302] *Id.*

[303] *Id.* para. 250.

[304] *Id.* paras. 140-148.

the consumer price index.[305] In addition, a portion of the excise duty paid on motor vehicle fuel and ordinarily not used for the road system would be used to support the compensation scheme.[306]

From the perspective of general deterrence, perhaps the most significant elements of the Law Commission recommendations regarding funding are those that assert that the various levies are not premiums to fund an insurance system but taxes to fund a social welfare program.[307] In accordance with that view, the Commission has recommended that henceforth the strict separation of the existing three accounts—earners, motor vehicle, and supplementary—be weakened and that moneys received from all sources be intermingled in a single fund to provide for Compo benefits and ACC administrative expenses without regard to the source of the accident.[308] To sever the relationship between accident causers and accident costs even further, the Commission has recommended that "as with other taxes Parliament should directly exercise its constitutional function of determining from time to time the rate of the particular levies."[309] This would provide the government with "the general opportunity each year to make an overall assessment, against the Corporation's estimate of its needs, of the amount to be gathered from the three or four sources and the balance that should be struck between them."[310]

Under such a system it would seem to follow that in the future shortfalls produced by excessive or unexpected accident costs would not have to be financed by sharp increases in employer or driver levies. Instead, the government would have the responsibility of providing the needed funds and could, if it so desired, simply draw them from general tax revenues, thus blunting the kind of outcry from levy payers that generated the 1986-87 crisis.

3. *Accident Prevention*

Although it reaffirmed the view of the Woodhouse Report and the Accident Compensation Act that the most important way to deal with personal injury accidents was through prevention,[311] the Law Commission's report ultimately rejected any significant role by way of deterrence or prevention for the compen-

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[305] *Id.* para. 241.

[306] *Id.* para. 240. The Commission's justification for applying a portion of the fuel tax is that, "[g]iven that this particular tax is directed at road users and in particular had some regard to the extent of their use and their exposure to the risk of accidents, it does appear to us to be an equitable and efficient means of providing funds for the accident scheme." *Id.*

[307] *Id.* para. 243.

[308] *Id.* paras. 242-249.

[309] *Id.* para. 244.

[310] *Id.*

[311] *Id.* paras. 105-106.

sation scheme. After acknowledging "the widely held opinion that [the promotion of safety is] not adequately handled in our system of government,"[312] the Commission's principal response was to propose that a Minister of Safety be appointed and placed in charge of the entire field of safety.[313]

To arrive at its relatively relaxed and non-urgent response to the problem of accident prevention, the Commission first found it necessary to confront the problem of increasing costs[314] and to deal once again with the question whether elimination of tort liability for personal injuries might also have eliminated effective deterrence.

Curiously, although the possibility was brought to its attention,[315] the Commission in its report never explicitly mentioned that an increase in the rate or severity of accidents might have accounted for some of the mysterious cost creep. Rather, it relied on a study conducted by actuaries at the Commission's request[316] which itself never suggested such possibility. In the study the authors identified an "unexplained expenditure growth" from 1975-76 to 1984-85 of about fifty percent or more.[317] They downplayed the importance of the increase, however, by stating that the annual growth rate—about 4.6 percent per year—"is similar to or lower than the average rates of unexplained cost increases observed by many Australian workers compensation and compulsory third party schemes in the same period."[318] In response to the question whether it is possible to isolate any causes for the unexplained increases, the actuaries responded by suggesting several possibilities other than a worsening accident problem.[319]

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[312] *Id.* para. 104.

[313] *Id.* para. 128.

[314] *See supra* text accompanying notes 172-80.

[315] *See, e.g.*, Submission to Law Commission, *supra* note 14; Miller, *Plugging the ACC's Biggest Leak*, Nat'l Bus. Rev., July 24, 1987, at 17, col. 1. Evidently, other than the Author's, none of the many submissions to the Law Commission showed any interest in a return to the tort system. Letter from Jeffrey O'Connell to Richard S. Miller (August 16, 1988) (reporting on communication from the Law Commission). Since then, however, an article in a New Zealand journal has proposed the reinstatement of the tort action as a supplement to regulation controlling hazardous technology. Hide & Ackroyd, *Liability and the Control of Hazardous Technology*, 1988 N.Z.L.J. 277. *See also* text *infra* accompanying notes 397-404.

[316] Cumpston & Madden, *Report on the Costs of the Accident Compensation Scheme*, in SECOND WOODHOUSE REPORT, *supra* note 30, at 196 app. C.

But see Hide & Ackroyd, *Liability and the Control of Hazardous Technology*, 1988 N.Z.L.J. 277 (describing statutes regulating hazardous technology and characterizing them as providing "considerable scope for comprehensive control" but nevertheless proposing reinstitution of a civil action for personal injury).

[317] They also explained that if, over the nine year period, lump sum payments and ERC payments had not kept pace with inflation, as was probably the case, then the unexplained increase "would probably be higher than the 50% estimated . . . ." *Id.* at 205.

[318] *Id.*

[319] These were: (1) as to increases in weekly benefits, from increased unemployment, especially

As to the possibility of reintroducing the tort system, the Commission in effect reaffirmed the views of the Woodhouse Report, upon which Compo was originally based, that tort liability fails both as a deterrent to accidents and as a compensation system.[320] In arriving at this conclusion, the Commission noted that "much recent American writing addresses the 'torts crisis,' 'the failure of tort law' and the related 'insurance crisis,' "[321] but drew its main support from "the prevailing view of leading commentators on civil liability for personal injury[,]" particularly Professor Andre Tunc,[322] as buttressed by Professor Craig Brown's study of automobile accidents and fatality rates in New Zealand.[323]

Apart from the fact that not all leading commentators on civil liability necessarily share Professor Tunc's view of the failure of tort law as a deterrent,[324] the validity of Professor Brown's study as general support for that view beyond the motoring context, as he himself was careful to note,[325] is not established. In-

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in rural areas, and from a change in § 59(2) of the 1982 Act whereby those earners who suffer temporary partial disability but who cannot find work do not have their ERC reduced by the amount of earnings they might have had if they could have found work; (2) as to increases in lump sum payments for noneconomic loss for permanent loss or impairment of bodily functions, from an increase in the maximum from $7,000 to $17,000 which commenced in April, 1983; (3) as to increases in the lump sum payments for pain and suffering or loss of amenities of life, from "the increased tendency to award maximum or near maximum amounts for relatively minor impairments;" (4) as to increases in medical payments, from increasing costs of various medical and paramedical services plus "some continuing tendency to charge the Corporation for non-accident related treatment"; and (5) as to increases in hospital payments, partly from general medical cost increases and partly from greater use of private hospital facilities. *Id.* at 208-09. Neither an increase in accidents or their severity nor an increase of fraudulent or false claims (except, perhaps, for the charges for non-accident related treatment) was mentioned. Professor Gellhorn suggests, however, that "means can and should be developed" effectively to control professionals and others to whom the state has given licenses and to encourage greater care in other areas, such as driving and construction, as well. Letter from Walter Gellhorn to Richard S. Miller, Aug. 15, 1988.

[320] WOODHOUSE REPORT, *supra* note 10, paras. 78-113.

[321] SECOND WOODHOUSE REPORT, *supra* note 30, para. 79.

[322] Identified in the report as a scholar who, in the 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 14 (1983 & Supp. 1986), flatly rejected fault as the basis for determining compensation. *Id.*

[323] Brown, *supra* note 3.

[324] *See, e.g.*, Galanter, *Beyond the Litigation Panic*, 37 PROC. ACAD. POL. SCI. 18, 29 (1988); Henderson, *supra* note 3; Posner, *Can Lawyers Solve the Problems of the Tort System?*, 73 CALIF. L. REV. 747, 749-51 (1985).

[325] Professor Brown in his article clearly articulated the reasons why the negligence system is not a major factor in deterrence in the automobile accident context as compared with other areas. Brown, *supra* note 3, at 978.

In his study of road accidents, Professor Brown did not mention one factor which, in the motoring context, may have more than substituted in New Zealand for any general deterrence or internalization of costs produced by liability insurance premiums: the highly and artificially inflated prices of automobiles in New Zealand. Probably because of customs duties, car prices there

deed, to the contrary, he has stated: "Despite the protection provided by liability insurance, the deterrent effect of negligence law remains strong outside the context of motoring."[326] And both Professor Brown and the Law Commission agreed that the absence of comparable statistics with regard to unintentional injuries outside of the driving context made it impossible to present evidence of the effect of eliminating tort liability on accidents in areas other than automobile accidents.[327]

Nevertheless, the Law Commission rejected any return to tort liability for personal injury and, having done that, proceeded also to reject most other financial safety incentives, both existing and proposed,[328] and including the current distinctions based on employee injuries among 103 industrial activities.[329]

As to the safety incentives which might be lost by giving up bonuses and penalties and by rejecting experience rating, the Law Commission argued that on the one hand these so-called incentives are not effective and on the other

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are many times higher than they are in the United States, whether the differences in the values of the two currencies (the New Zealand dollar was worth between $0.56 and 0.59 U.S. at the time) are taken into account or not. Thus, for example, the advertised prices for used autos in the Dominion Sunday Times of July 19, 1987, at 40, included the following: 1986 Mazda RX7, $73,000; 1983 VW Scirocco GT, $23,990; 1986 Honda Civic, $23,990; 1984 Honda Accord 3-dr., $23,500; 1984 Mazda 626, $22,990; 1986 Chevrolet Camaro, $84,990. While the demand for automobile transportation may be highly inelastic, these awesome prices arguably could not have helped but reduce the overall driving activity in New Zealand over what it might have been if only market forces dictated prices. On the other hand, it is also possible that the fantastic prices of new and nearly new automobiles has led to excessive driving of older and hence less safe vehicles. (For example, the author, in February of 1987, paid about $7,000 for a 1974 Triumph Saloon; at home in Honolulu the author's oldest car in 1987 was a 1981 Subaru.)

If the prices of automobiles were about as high in relation to the cost of living in New Zealand before 1974, when Compo came into force, as they were after that date, then this factor would not affect Professor Brown's conclusion, based mainly on comparisons of injuries *per mile driven*, that the advent of Compo did not cause an increase in motor vehicle accidents. However, the high price of automobiles in New Zealand would affect the accuracy of comparisons with road accident rates in other countries (and in New Zealand if auto prices were relatively lower before 1974) in two ways: First, high auto prices would arguably chase younger drivers—who often account for a disproportionately high percentage of accidents—out of the car-buying market. Second, the high cost of automobiles might significantly reduce the total number of miles driven in New Zealand as compared with nations with lower prices. The first factor would improve New Zealand's rate of injuries per mile driven and the second would improve its per capita rate of injuries. Thus, comparisons of motor vehicle injury rates between New Zealand and nations that retain tort liability which indicate similar rates of accidents per mile driven or per capita may not accurately reflect an adverse effect on accidents produced by elimination of the tort action in New Zealand.

[326] Brown, *supra* note 3, at 978.

[327] *See* Brown, *supra* note 3, at 980; SECOND WOODHOUSE REPORT, *supra* note 30, para. 80.

[328] *See supra* text accompanying note 305.

[329] *See* SECOND WOODHOUSE REPORT, *supra* note 30, paras. 250-269.

hand there are other more effective safety motivations and strategies either in place or available for adoption. Some elaboration of both of these arguments seems warranted here.

a. Inadequacy of Incentives

As to the ability of variable levies—adjusted according to the accident costs of work-related accidents of employees in each class of industrial activity—to produce deterrence, the Law Commission argued, quite convincingly, that unless a particular employer enjoys a monopoly, its ability to lower the levy for its industrial class is very much in doubt; levies could only be decreased if the overall worker accident cost for all firms engaged in the same activity were lowered. Thus, the hope of reducing such levy by reducing a company's own accident costs is unrealistic.[330]

As the Commission itself noted,[331] however, variable levies by industry are different from bonuses and penalties on individual companies and from experience rating of individual companies. But these, too, the Commission found to be seriously flawed. The problems discussed included (a) difficulties of scale—most New Zealand companies employ 100 or fewer workers, while the minimum base of employees necessary for accurate merit rating is in the thousands; it is unfair to penalize some small firms and to give others bonuses based on safety records which are based on too few incidents to determine with accuracy the relative safety of such enterprises; (b) difficulties of time lag, whereby penalties or bonuses or new ratings may be imposed long after the situation which engendered them may have changed, for the better or worse; (c) difficulties of prediction, contributed to by the time lag, since employers will not be able to measure or predict the effects of their safety decisions on bonuses, penalties, or ratings; prediction will be particularly difficult and potentially unfair if accident costs, rather than frequency, are used as the base (as they now are in setting levies) since the costs of particular accidents may be fortuitous and since some accident costs, such as those dealt with only by the public hospital system, are not included in the base; (d) difficulties of under-reporting, as where employers discourage the reporting of accidents in order to avoid penalties or to keep their ratings low; and (e) difficulties in creating incentives where, as in past practice, the bonuses or penalties tend to be small.[332]

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[330] *Id.* paras. 137-138.

[331] *Id.* paras. 138, 140.

[332] *Id.* paras. 140-149. In reaching these judgments the Law Commission relied on a recent report of the Economic Council of Canada, Chelius & Smith, *The Impact of Experience Rating on Employer Behavior: The Case of Washington State*, in SEVENTH ANNUAL SEMINAR ON ECONOMIC ISSUES IN WORKERS' COMPENSATION (1987), sponsored by the National Council on Compensation

b. Other Safety Incentives

In view of these problems with bonuses, penalties, and experience rating, the Law Commission expressed a strong preference for imposing penalties "by reference to observed conditions[;]"[333] that is, by using inspectors who have the power to assess penalties, in the manner of the Occupational Safety and Health Act (OSHA)[334] in the United States. The Commission, however, did not make any specific recommendation as to whether the power should reside in the ACC since the government had yet to decide whether to create a separate "one Act - one Authority" occupational safety program like OSHA for New Zealand.[335]

What is particularly interesting is the Commission's views as to where, absence tort liability and the specific prevention strategies it rejected, it believes incentives for safety emerge under the amended regime it is recommending. In its report the Commission summarized its views in a section entitled "Safety incentives in general."[336]

First, the Commission asserted that the safety incentives of workers and employers will be increased by adding one week to the current one week delay after injury before Compo benefits become payable.[337] This incentive may well discourage false claims by workers who might otherwise be tempted to use Compo to finance a two-week hunting trip, or other vacation, by feigning an off-work injury and may also serve as an inducement to workers to exercise greater care off the job, since only earners who suffer on-the-job accidents must under the proposed amendments be paid earnings for their second week by their employers. With respect to work-related accidents to their own employees, therefore, the principal new incentive of having to bear an additional week of wages will be on employers, who will thus have an increased incentive to prevent worker accidents.

Second, the report refers to self-interest of individuals, in the varying contexts where they may suffer accidents, and especially of employers, who may "as a result of accident . . . lose the services of a skilled experienced employee"[338] or suffer other direct costs such as property damage, interruption of production,

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Insurance at the Wharton School, University of Pennsylvania, and on 1 REVIEW BY OFFICIALS COMMITTEE, *supra* note 85, at 56 (reporting that the safety incentive bonus program ceased "partly because of data deficiencies, partly because of the difficulty of determining better performance, and primarily because no link could be found between bonuses and improved prevention performance").

[333] SECOND WOODHOUSE REPORT, *supra* note 30, para. 148.

[334] The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970).

[335] *See* SECOND WOODHOUSE REPORT, *supra* note 30, para. 148.

[336] *Id.* paras. 131-149.

[337] *Id.* para. 132.

[338] *Id.* para. 133.

loss of profits, or other consequential damage. At this point the report recognizes that for the employer many of these losses will be covered by loss insurance. Rather than asserting that the existence of the ability to spread a risk through insurance weakens deterrence, as is the position consistently taken with regard to liability insurance, the Commission states:

> (The total of fire and accident premiums in New Zealand is considerably in excess of Accident Compensation levies.) Accordingly, such incentives as an insurance policy may provide through experience rating, accident prevention (by increasing premiums if safety measures are not taken), no claims bonuses, and the like are already relevant to many accidents that may also cause personal injury.[339]

It is reasonable to ask why the Commission believes these financial incentives produced in the case of accidental injury to property should be any more effective than the Commission has asserted they are when applied to accidental injury to person.

Third, the Commission asserts that the prospects of accident costs to their business property or profits has led some businesses to adopt sophisticated safety programs which not only enhance safety but produce better relations with employees and improve production and generally lower costs.[340]

Fourth, there is a "growing acceptance of the need for methods for the promotion of workplace safety involving cooperation between all involved."[341] This has led to legislation which provides for the development of voluntary safety codes.[342] It is also "part of a world-wide movement towards greater worker participation in occupational health and safety."[343]

The fifth incentive merits direct quotation: "Unsafe methods of work or products which cause damage to property outside the work place *can be the subject of civil actions in the courts by those damaged.* Again[,] *insurance may have a role.*"[344]

Here, the inconsistency between the Law Commission's deprecatory view of the efficacy of the civil action for personal injury damage cum liability insurance as safety incentive and its positive view of the safety incentives engendered by law suits to recover for property damage seems inexplicable.

Sixth, there are incentives for safety for professionals and others in disciplinary processes which "will be significant in some situations."[345] In such situa-

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[339] *Id.*
[340] *Id.* para. 134.
[341] *Id.* para. 135.
[342] *Id.*
[343] *Id.*
[344] *Id.* para. 136 (emphasis added).
[345] *Id.*

tions, unlike those which give rise to law suits, there will be no insurance available to weaken the incentive to safety.[346]

Seventh, "much safety legislation imposes standards and rules which can be supervised and enforced through inspection, courts and commissions of inquiry, and prosecution in the criminal courts."[347]

Eighth, in some situations those who cause injuries to others may be prosecuted for a crime such as manslaughter in the criminal courts.[348]

D. *The Effect of the Law Commission's Recommendations*

Viewing the specific changes the Law Commission has recommended, it can be concluded:

First, that the Law Commission has, in practical effect, rejected any serious role in accident prevention for the ACC and the Compo scheme. Any deterrence that may be added by transferring responsibility for the second week of disability to the employer or, for non work-related accidents, to the employee, is minuscule, especially when compared with the externalization effects of (1) turning all medical expenses of accidents over to Social Security; (2) extensively disassociating the sources of funding and the accounts from which benefits are paid from any correlation with the costs of accidents; (3) adopting a flat-rate system for employer levies; (4) rejecting bonuses, penalties, and experience rating for employers and auto owners and rejecting any levies on drivers; and (5) generally recommending that levies be considered to be taxes and that government, rather than the ACC, be given the responsibility for raising them not only from existing sources but from motor vehicle fuel taxes and from general revenues, as well. Indeed, the Commission has suggested the placement of safety responsibility elsewhere (in a new Safety Minister and staff), has eschewed any desire to impose the costs of accidents on those persons and activities who cause them,[349] and has conveyed the view that Compo is, or should become, a pure social welfare program funded by general taxation.[350]

Second, that the Law Commission's recommendations with regard to benefits will significantly increase the overall costs of the scheme, notwithstanding the elimination of existing lump-sum payments for noneconomic losses, by extending very expensive periodic payments based on degree of disability and New Zealand's average weekly wage to non-earners who are not now entitled to such payments; by equalizing medical benefits for illness victims with those

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[346] *Id.*

[347] *Id.*

[348] *Id.*

[349] *Id.* paras. 256-257.

[350] *See, e.g., id.* para. 44.

provided under Compo for accident victims; by extending Compo to cover victims of occupational and other injury-causing events that occurred prior to 1974, the manifestations of which did not occur until after 1974; and, possibly, by also extending coverage to victims of congenital diseases. It is clear, however, that by removing the payment of health-related costs from ACC's responsibility and shifting it to Social Security, costs of the Compo scheme will, to that significant extent, *appear* to be reduced.

Third, that while costs will increase significantly, the political outcry that might otherwise ensue from levy payers under the current scheme will be muffled initially by adopting a single flat rate for employers[351] and ultimately by shifting most of the increased costs onto general taxation.

Thus, the expansion of Compo as envisioned by the Law Commission may from its perspective seem humane and consistent with its underlying principles.[352] Unfortunately, the problems not resolved and probably exacerbated by the report's recommendations include a worsening accident situation and the not unrelated cost creep. The latter, in view of New Zealand's difficult economic situation,[353] will probably make it impossible over the long run to adhere to the principle of real compensation and will surely prevent the achievement of comprehensive coverage of all disability.

It has been suggested that to criticize Compo because it does not provide comprehensive coverage for disability caused by illness as well as accident or to resist wider coverage, as recommended by the Law Commission, on the same grounds, is to make the best the enemy of the good.[354] The fact is, however, that when the larger economics of New Zealand are considered,[355] costs of the accident scheme as expanded according to the Law Commission's recommendations and as increased by uncontrolled accidents could become the enemy of Compo itself and not just of efforts to expand the protection of those with

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[351] However, those employers who previously paid less than the new flat rate may very well oppose the change. Indeed, the proposal for a flat-rate levy evidently drew significant opposition from employers in industrial activities which were paying less than the $2.50 rate earlier recommended by the Commission. *See id.* para. 253. Their opposition may be muted by the fact that no such levy payer would end up paying more than twice its prior levy. The changes that gave rise to the uproar in the first place, however, were as high as 500 percent.

[352] Indeed, the recommendations in some respects simply reassert ideas, such as flat rate levies and periodic payments for disabled non-earners, originally put forth in the Woodhouse Report but never implemented. *See* WOODHOUSE REPORT, *supra* note 10, paras. 441, 467-468.

[353] *See, e.g.*, Hayward & Sherwell, *Markets Descend into Gloom Following Douglas's Departure*, Financial Times, Dec. 15, 1988, at 6, col. 1; McGurn, *New Zealand's Painful Economic Cure*, Wall St. J., Oct. 11, 1988, at 22, col. 3; Richardson, *Economies: Freedom to Fail*, Far East Econ. Rev., Aug. 25, 1988, at 56, col. 1; Sullivan, *OECD suggests cuts in welfare*, Dominion (Wellington, N.Z.), June 2, 1987, at 1, col. 1.

[354] SECOND WOODHOUSE REPORT, *supra* note 30, para. 61.

[355] *See supra* note 353.

illness-based disability.[356]

It seems to follow that much greater attention needs to be given to cost—and accident—containment than has been given by the Law Commission. Indeed, purely humane considerations seem to require considerably more attention to deterrence of accidents than the "let George do it" approach of the Law Commission.

VI. TORT LIABILITY AS A BACK-UP FOR COMPO

Not only is general deterrence of accidents in New Zealand virtually non-existent, but specific deterrence—direct regulation of safety—is weak and ineffectual.[357] For example, there exists no comprehensive occupational safety and

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[356] As to the latter, it has been estimated that in Great Britain, for example, the incidence of incapacity by disease and other causes not attributable to accidents exceeds accident-produced incapacity by about ten times. *See* J. STAPLETON, *supra* note 3, at 5-6. It has also been estimated by the Officials Committee that extending the scheme to those seriously disabled other than by accident would add about 21,500 persons eligible for the invalids' benefit plus an unknown but potentially large number who are currently disqualified because of their spouse's income or who may be eligible for invalid benefits but have not applied. *See* 1 REVIEW BY OFFICIALS COMMITTEE, *supra* note 85, at 14. The Law Commission itself stated that Compo only covers "a small proportion of the disabled," and cites a recent estimate that the ACC is only concerned with about one quarter of 416,000 persons disabled for a month or more. SECOND WOODHOUSE REPORT, *supra* note 30, para. 153. The costs of extending ERC or, if they are not earners, periodic payments for permanent incapacity along with medical benefits approaching those now available to accident victims to these disabled persons would likely be monumental. It is understandable, therefore, why the Royal Commission on Social Policy, being concerned about overall welfare requirements in New Zealand, recommended extending the waiting period for Compo benefits to four weeks and replacing ERC after two years with a modest flat-rate payment. *See id.* para. 14.

[357] *See* T. ISON, *supra* note 3, at 159-77. *Cf.* SECOND WOODHOUSE REPORT, *supra* note 30, paras. 105-149; McBride, *Safer Cars Forced on Motor Industry*, NAT'L. BUS. REV., July 2, 1987, at 1 (proposal by transport undersecretary to require auto assemblers in New Zealand to comply with certain overseas regulations on design; "New Zealand is alone among western democracies in not having minimum standards." *Id*; *cf.* Dominion (Wellington, N.Z.), July 20, 1987, at 2, col. 5 (report that the Government is granting $100,000 to the Ministry of Consumer Affairs "to carry out its product safety work. . . . for staffing, standard setting and the investigation and testing of allegedly unsafe products. . . . [plus] $50,000 for the development and revision of standards").

The Fair Trading Act 1986 does permit actions for penalties against product manufacturers and sellers who sell products in violation of the Act. The maximum penalties, however, of $30,000 for individuals and $100,000 for corporations, *id.* § 40, fall far short of possible tort damages for injuries caused by defective products. These provisions were not adopted until 1986 notwithstanding the recommendation of Geoffrey Palmer, in 1975, to create a product safety commission to fill the gap in deterrence created by the externalization of accident costs which attended the adoption of the Accident Compensation Act of 1972. Palmer, *Dangerous Products and the Consumer in New Zealand*, 1975 N.Z.L.J. 366, 377-80.

health program under a single act[358] and disciplinary procedures for health professionals, which the Law Commission cites as an important safety incentive because actors are not insulated by insurance,[359] is weak and seldom used.[360]

Agencies which might afford effective specific deterrence, however, require significant investments of public funds and large cadres of skilled employees, inspectors, and administrative staffs and are rarely financially self-supporting—even though they may have authority to impose fines and penalties. Further, in order to reach the myriad sources of accident-causing behavior both within and beyond the occupational safety and health arena, such agencies would have to become both intrusive and coercive to a degree which is probably unacceptable to most New Zealanders. Therefore, the only system which has a chance of restoring effective deterrence and providing a significant new source of income to reduce the costs of Compo is the tort liability system *if tailored for use as a supplement to the accident compensation scheme*. In my submission of May, 1987 to the Law Commission, drawing on the outlines of a suggestion previously offered by Professor Jeffrey O'Connell in connection with proposals for no-fault in the United States,[361] I recommended such a plan. Although the Law Commission in its final report in effect rejected any return to what it believed to be the discredited tort system,[362] my proposal, as well as the joint response of Professors Brown, O'Connell, and Vennell to that proposal, remain relevant for the future both for New Zealand and for any other nation or state enticed to contemplate a comprehensive accident compensation scheme like Compo.

A. The Author's Proposal

Following are the essential features of my recommendation[363] for reintroduction of the tort action for personal injuries as a supplement to Compo:

1. The present accident compensation scheme, as it might be amended in

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[358] SECOND WOODHOUSE REPORT, *supra* note 30, para. 152.

[359] *See supra* text accompanying notes 340, 341.

[360] *See* Gellhorn, *supra* note 3, at 196-202.

[361] O'Connell, *Transferring Injured Victims' Tort Rights to No-Fault Insurers: New 'Sole Remedy' Approaches to Cure Liability Insurance Ills*, 1977 U. ILL. L.R. 749. *See also* Klar, *supra* note 3, at 89, 102.

[362] *See supra* text accompanying notes 315-18.

[363] These have been modified slightly from the author's original proposal in his submission to the Law Commission. Essentially, however, the proposal remains the same. *See* Submission to Law Commission, *supra* note 14. Much of the detail included in the submission, including examples of how the system would work in practice, *id.* at 11-15, and how certain problems, such as how to allocate the right to settle a claim between the victim and the ACC, *id.* at 14-15, are omitted here in order not unduly to extend the length of this article.

response to recommendations currently before the New Zealand government, would remain *the primary source* of compensation for accident victims.

2. The common law right to bring proceedings at law for damages for injury or death arising from an accident would be restored except in the case of actions by employees against their employers for work-connected accidents.[364]

3. Every person eligible to receive benefits from the ACC would be deemed to have assigned to the ACC any tort claim he or she might have against any third person for personal injury or death damages, *but only to the extent of the total value of the benefits he or she is entitled to receive both from the ACC and from other governmental sources*, plus certain legal costs.

Legislation giving effect to this assignment would be similar to the design of provisions found in some workers' compensation acts in which an employer is subrogated to the employee's tort claim against third parties to the extent of workers' compensation benefits paid by the employer or its insurer to the injured worker.[365] Preferably, the primary right to bring suit would be given to the ACC, with a right of the victim to intervene in the action. Regardless of who prosecuted the action, however, the ACC's assigned right would be primary and against the entire judgment; *the victim would receive nothing from the tort recovery until the ACC's right to full reimbursement was satisfied.*[366]

4. The existing right to prosecute actions for punitive damages in personal injury cases and *to retain the damages* would be transferred to the ACC.[367]

5. The right to receive lump sum payments for noneconomic loss *under the Act* would be abolished but could be replaced with periodic payments based on

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[364] Not reviving employees' common law rights against their employers for work-related injuries seems to be justified by the very special and continuing relationship between them and by the difficulties that are likely to arise in actions between them. However, either lump sum payments for noneconomic loss, *cf.* HAW. REV. STAT. § 386-12 (1985) (up to $15,000 allowed in cases of disfigurement), or, preferably, additional periodic payments to compensate for the non-earnings losses caused by disability, *see supra* text accompanying notes 270-74, would be allowed as a tradeoff—as the payment of noneconomic losses now is—for the relinquishment of workers' common law rights against their employers.

The right of action by employees against third parties would be revived, however, and the ACC would be assigned the employee's tort rights in that situation.

[365] *See, e.g.*, HAW. REV. STAT. § 386-8 (1985).

[366] As a condition of receiving Compo benefits, a beneficiary should be required to agree to cooperate with the ACC in the prosecution of its claim against the tortfeasor, much as an insured under a liability policy is required to cooperate with the insurer in defense of a claim adverse to the insured. However, the right to recover damages in addition to Compo benefits, after the ACC's rights are satisfied, might constitute a more effective incentive.

[367] Amounts received by the ACC by way of punitive damages would not be considered as reimbursement of ACC benefits paid or payable to the victim. Where the ACC fails to prosecute a claim for punitive damages within a certain period of time after the accident, however, the victim should be given that right and also be permitted to retain the proceeds in that event.

degree of disability for all claimants.[368]

6. If there is concern about problems allegedly created by the common law system of tort liability, such as affordability and availability of liability insurance, delay in payment, high transaction costs, excessively high judgments, overdeterrence, overburdening of the courts, unfair allocation of liability among joint and several tortfeasors, and the like, New Zealand is in an excellent position to adopt specific measures designed to eliminate or mitigate them.[369] These might include:

a. *Eliminate jury trials.* Under the New Zealand Judicature Act of 1908, jury trial in civil actions may lightly be dispensed with by the judge in certain cases;[370] it would not be a major step to do away with it entirely in cases of injury by accident.

b. *Adopt alternative modes of dispute resolution.* Mandatory arbitration, creation of special administrative tribunals, or creation of dispute resolution centers, as in Japan,[371] may be established either as substitutes or pre-conditions for

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[368] Workers have generally considered the lump sum payments for noneconomic loss as part of the tradeoff for giving up their common law right to recover for pain in suffering in favor of Compo. *See* G. PALMER, ACCIDENT COMPENSATION, *supra* note 3, at 223. Thus, any attempt to remove such payments without providing an equivalent, such as the periodic payments for percentage of loss of physical capacity, *in addition to ERC*, will predictably encounter stiff resistance from the labor movement.

[369] *See infra* note 413 and accompanying text.

In the author's view, the urgency of the need in New Zealand to restore the deterrence provided by reintroduction of the common law action, whether in a much-modified or limited form or not, seems to outweigh the harm that might be caused by the possibility that some or all of these concerns have not been and cannot be sufficiently validated.

[370] Judicature Act of 1908, § (5), as amended. The court may order that a civil action be tried without a jury where the court determines that the trial "or any issue therein will involve mainly the consideration of difficult questions of law", *id.* at (a), or that the trial or any issue may involve "prolonged examination of documents or accounts" or "difficult questions in relation to scientific, technical, business, or professional matters . . . being an examination or investigation which cannot conveniently be made by a jury." *Id.* at (b).

[371] *See* Miller, *Apples vs. Persimmons - Let's Stop Drawing Inappropriate Comparisons Between the Legal Professions in Japan and the United States*, 17 VICT. U. WELLINGTON L. REV. 201, 211-12 (1987).

An interesting experiment with mandatory non-binding arbitration of all personal injury actions where the amount claimed is less than $150,000 is underway in Hawaii. Of particular interest is the attempt, evidently successful, to limit discovery costs. *See* Barkai & Kassebaum, *The Impact of Discovery on Cost, Satisfaction, and Pace in Court-Annexed Arbitration*, 11 U. HAW. L. REV. ____ (1989).

Costs of public administration and the judiciary could be saved if the decision-making apparatus were made self-supporting. For example, the traffic accident dispute settlement centers in Japan are financed by the liability insurance companies. Another possibility is to have the ACC fund the costs of administrative tribunals from recoveries received pursuant to the assignment of victims' tort claims.

common law trials. These should be made self-supporting, thus avoiding increased costs of public administration and of the judiciary.

c. *Modify liability and damage rules.* Since the primary role of the liability system would be deterrence, and since Compo would remain the primary source of accident compensation, appellate courts deciding upon appropriate rules for a reinstated liability system might feel free to ignore or downgrade risk-spreading, admirably handled by Compo, as a policy reason for expanding liability.[372] Damages in cases where liability is not necessarily based upon fault, as in actions to impose strict liability for defective products, might be limited to economic losses suffered by the victim.[373] Damages in actions to recover only for negligent infliction of emotional distress or for loss of consortium might also be limited to economic losses occasioned by the distress.[374] Damages might be

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[372] *Compare* Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 462, 150 P.2d 436, 440 (1944) (Traynor, J., concurring) (In this seminal opinion urging the adoption of strict liability for defective products, Justice Traynor said: "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."). According to one thoughtful commentator, a significant cause of the crisis in insurance availability and affordability in the United States has been the use of tort liability for insurance—risk spreading—purposes. *See* Priest, *Understanding the Liability Crisis*, 37 PROC. ACAD. POL. SCI. 196 (1988); Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L. J. 1521 (1987); Priest, *The Liability Crisis*, YALE L. REP. 2 (Fall 1987). *But see* Letter from Michael J. Sacks, *Letters to the Editor*, YALE L. REP. at 14 (Fall 1988).

[373] *Cf.* Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 376 (1965). Traynor states that:

> Any system of enterprise liability or social insurance designed to replace existing tort law as the means for compensating injured parties should provide adequate but not undue compensation. . . . [O]nce adequate compensation for economic loss is assured, consideration might well be given to establishing curbs on such potentially inflationary damages as those for pain and suffering. Otherwise, the price of assured compensation could become prohibitive.

Id. (citation omitted).

While not directly apposite, Traynor's position would seem to support the argument that in actions based on strict liability, which is a form of "enterprise liability," where adequate non-fault compensation is available damages should be limited to economic losses.

Other more severe modifications might include eliminating strict liability altogether and, in actions for negligence, insisting on proof of subjective fault or blameworthiness before awarding noneconomic losses. *Cf.* U.S. ATTY. GEN'S TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 30-33, 61-62 (1986). For other possible modifications of the common law system, *see* REPORT OF THE ACTION COMMISSION TO IMPROVE THE TORT LIABILITY SYSTEM (1987).

[374] *See* Diamond, *Dillon v. Legg Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477 (1984); Miller, *The Scope of Liability for Negligent Infliction of Emotional Distress: Making "The Punishment Fit the Crime,"* 1 U. HAW. L. REV. 1 (1979). *See also* Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L.

discounted for doubt; that is, explicitly reduced by the degree or percentage of doubt entertained by the fact finder as to whether the victim has proved his or her case.[375] The rule of joint and several liability applicable to multiple tortfeasors might be modified in situations where particular classes of defendants are found, after carefully study, to suffer a disproportionate share of the liability to which their actionable acts or omissions contributed.[376] The rule should also be modified in cases in which the joint tortfeasor is immune from liability, as in the case of employers with regard to work-connected injuries to their workers.[377]

d. *Enlarge the defense of assumption of risk.* The defense of implied assumption of risk, which in many jurisdictions in the United States has been eliminated,[378] or has been swallowed up by the defense of comparative fault, could be reinstated. Recovery would be barred if it were proved that plaintiff was fully apprised of the risk and made a truly voluntary choice to encounter it *in order to receive a benefit provided by the defendant.*

7. Liability insurance. Because Compo eliminates only personal injury actions, many enterprises already purchase property damage liability insurance. If a tort

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REV. 772 (1985).

[375] This would resemble the manner in which under comparative fault damages are reduced by the degree or percentage of the claimant's contributory fault. This reduction, however, could be separately applied to the plaintiff's case and to the defendant's affirmative defenses. *Cf.* Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1382-90 (1985)(explained but not necessarily approved by the author). It would be similar to, but not the same as, cases which allow ill plaintiffs who suffer injury from negligent failure to diagnose their illness to recover for the value of the chance that if the diagnosis had been correct they would have recovered. *Cf.* McKellips v. Saint Francis Hosp., Inc. 741 P.2d 467 (Okla. 1987). *See generally* King, *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981). As to similar issues in cases of man-made disease, see Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984).

[376] I am thinking particularly of public entities and public utilities, for example. They are often the "deep pocket" defendants in motor vehicle accident cases and, when found slightly at fault in comparison with the driver, all too often end up paying most of the damages because the driver has inadequate liability insurance and other assessable resources. In the individual case this may not be a problem since, in theory and in fact, the negligence of each defendant is a cause in fact or substantial factor in producing the loss and each should be responsible for the entire loss. When this situation occurs in case after case, however, the deep pocket defendant who is a popular target may end up paying a grossly disproportionate share of the losses.

[377] *See, e.g.*, Kamali v. Hawaiian Elec. Co., 54 Haw. 153, 158, 504 P.2d 861, 864 (1972) (noting that the majority rule allowing limited contribution by a third party defendant against an employer is based on "the proposition that it is unfair for one joint tortfeasor to bear the entire loss merely because the other joint tortfeasor is an employer"). *See generally* LARSEN, THE LAW OF WORKMEN'S COMPENSATION § 76.22, at 238 (1970).

[378] *See, e.g.*, Blackburn v. Dorta, 348 So. 2d 287 (Fla. Sup. Ct. 1977) (court abolished the doctrine of secondary implied assumption of risk).

supplement to Compo were adopted, these enterprises would need to expand their coverage to include liability for personal injuries. In addition, many other actors, such as individual homeowners, landlords of rental property, and health professionals, who may not now be purchasing any general property liability insurance other than for their motor vehicles, will have to reenter that market in order to protect themselves against such liability for personal injury. It will therefore become essential to keep premium rates reasonably low.[379] While the changes to the common law system suggested above might produce significant savings, close regulation of rates, investments, reserves, and other insurance practices in order to avoid wide cyclical swings experienced in the United States,[380] should be considered. On the other hand, the existence of a powerful State run insurance company, the State Insurance Office, which has acquired a significant part of the New Zealand general insurance market by virtue of its competitive premium rates and policy provisions,[381] may serve to keep the rates for all competing insurers reasonably low without having to resort to further regulation.

8. Experience rating. In order to enhance deterrence, determination of negligence or other fault in tort actions and determinations of wrongdoing in traffic accident cases should be required to be taken into account in determining liability insurance premiums.[382]

Possible criticisms. It will surely be argued that a return to tort recovery, even as a supplement, will violate the principle of "complete rehabilitation" since claimants with tort claims will have reasons to maintain their disability until the tort action is resolved. Indeed, it will be pointed out that the problem of "litigation anxiety neurosis" was one of the Royal Commission's stronger arguments for doing away with the personal injury action and adopting Compo in the first place.[383] It is doubtful, however, that a tort action could be a greater

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[379] In the Woodhouse Report, the plan was to use premiums formerly paid for workers' compensation by industry and the premiums paid by motor vehicle owners for liability insurance under compulsory third party insurance to help finance the accident compensation scheme. *See* WOODHOUSE REPORT, *supra* note 10, para. 312. With the tort system as a supplement, employers and motor vehicle owners paying levies will have to purchase bodily injury liability insurance, as well, in order to protect themselves against financial calamity.

[380] *See The Manufactured Crisis*, CONSUMER REP., Aug. 1986, at 544.

[381] *See* A. TARR, INSURANCE LAW IN NEW ZEALAND 34-36 (1985). Tarr notes that the State Insurance Office has about 20 percent of the total fire and general insurance market, *id.* at 34, and between 40-50 percent of the householders and motor vehicle insurance market, *id.* at 36. The State Insurance Office is governed by the State Insurance Act 1963.

[382] The Law Commission has evidently conceded that "such incentives as an insurance policy may provide through experience rating, accident prevention (by increasing premiums if safety measures are not taken), no claims bonuses, and the like " may constitute significant safety incentives. *See* SECOND WOODHOUSE REPORT, *supra* note 30, para. 133.

[383] WOODHOUSE REPORT, *supra* note 10, paras. 166, 118, 123-124.

incentive to maintain (and perhaps to falsify) disability than the prospects of an *irreducible* commitment to pay a permanently disabled victim up to 80 percent of his or her salary until retirement age.[384] But like determinations of permanent incapacity, tort determinations are also not re-examinable once a final judgment is entered or release signed. If streamlined modes of dispute resolution speed up the determination of fault, revival of the tort remedy would add little to the existing incentive to malinger and forestall rehabilitation.

Next, it may be argued that restoration of the complex machinery and issues of personal injury litigation would violate the principle of "administrative efficiency." In regard to Compo, however, claims and payment procedures need not be different from what they are today. Thus, with regard to the heart of the no-fault scheme, victims would experience no change in the promptness of payment as a result of the tort system. If enforcement of assigned tort rights were to be handled by an entirely separate, self-supporting division of the ACC, no administrative costs would be added to Compo.

While reinstitution of the tort remedy should not adversely affect the basic Compo scheme at all, it will be argued that the tort system would raise the cost of liability insurance to such levels that the combined costs of the two systems, operating in tandem, would impose an excessive burden on those compelled to contribute to levies and also to buy compulsory third-party insurance. There are several possible answers to this concern. First is the intent, mentioned above[385], to keep premiums reasonably low by close regulation or by virtue of the existence of a State-run insurance company. Second, tort judgments would be used to reduce Compo's costs and these reductions would be passed on to those paying levies.[386] Third, both a principal purpose and planned effect of the tort

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[384] *Cf.* G. PALMER, ACCIDENT COMPENSATION, *supra* note 3, at 230 ("Another important problem with the pattern adopted in New Zealand lies in the serious consequences upon rehabilitation. A person has an incentive not to go back to work in order to try and demonstrate that he has suffered a loss in his capacity to earn."). Under both the existing Act and the proposed Act, once a determination of permanent incapacity it made, the determination may not be altered. Accident Compensation Act, 1982, § 60(5); SECOND WOODHOUSE REPORT, *supra* note 30, § 51(93), at 131.

[385] *See supra* text accompanying notes 381-82.

[386] In some cases of severe and permanent disability the tortfeasor might agree to take over the ACC's responsibility to the victim entirely, by establishing an annuity or irrevocable trust. In additions, various arrangements between the ACC and liability insurers, as suggested by Professors Brown, O'Connell, and Vennell, wherein agreements to gain immunity from certain kinds of suits in exchange for substantial contributions each year to the ACC, might be also be tailored under this proposal. *See* J. O'Connell, C. Brown & M. Vennell, Reforming New Zealand's Reform: Accident Compensation Revisited 12-14 (Aug. 15, 1988) (unpublished manuscript) [hereinafter Reforming New Zealand's Reform]. Admittedly, such agreements might become more difficult to work out if victims retained their rights to sue for tort damages not compensated by Compo.

backup is to reduce the number and severity of accidents; this reduction will result directly in reduced levies or, to the extent that Compo costs are paid from general revenues, in reduced taxes. Fourth, there are currently many accident causers, including health care professionals, land owners and occupiers, motor vehicle drivers, building contractors, product manufacturers, retail sellers, public entities and their various sub-units, organizations conducting athletic activities, among many others, *who are contributing nothing except as general taxpayers to the disabilities and misfortunes they are causing to others beyond themselves and their own employees.* By spreading liability insurance premiums more equitably among all the groups who contribute to New Zealand's accident problem, the cost to each actor ought not to be excessive, except perhaps where a particular actor is appropriately surcharged for causing too many accidents. Further, it might be possible to achieve a reform sought by the Law Commission first by relieving all employers of levies to cover off-the-job worker accidents and then gradually moving to full funding of Compo, as with other social insurance programs, from general revenues,[387] or a combination of general revenues and user-pay fees. With that sort of change, employers would not view themselves as double-charged for Compo and for liability insurance. Finally, modifications of the tort system tailored to supplement a comprehensive compensation scheme, such as those mentioned above, could significantly limit the costs of litigation, the expenditure of attorneys' fees, and the percentage of the premium dollar expended for administrative expense.

Benefits. The principal benefits of a tort supplement to Compo would be, first, to rekindle the motivation to take concrete steps for the safety of others—whether through fear of a law suit, a desire to avoid an increase in liability insurance premiums, or through widespread reassimilation of the norms of tort law—which has fled the consciousness of New Zealanders under Compo and, second, to reduce the incidence of unsafe activities through general deterrence produced by directing accident costs toward the activities which caused them. That the tort system may not perfectly allocate costs or that it may be relatively inefficient in doing so is not a governing consideration when faced with a situation, like New Zealand's, where little more than the forlorn hope of universal altruism and enlightened self-interest is left to motivate decisions, even of product manufacturers in other nations as well as local actors, to avoid accidents.

Further, existence of a tort action may call attention to serious and festering dangers—as exemplified by recent controversies surrounding alleged failures in New Zealand to treat cervical cancer or to provide safe care at an orthopedic hospital—which in the absence of an incentive to sue may remain for long

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[387] *Cf.* SECOND WOODHOUSE REPORT, *supra* note 30, para. 228 ("[I]deally," supporting the scheme by general taxation, "is the right answer.").

periods of time unnoted.[388]

Moreover, the public sense of justice will be enhanced if intentional, reckless, and grossly negligent accident causers are compelled to compensate their victims. Although actions for punitive damages may still be available in some of these situations,[389] it may not be economically feasible in most cases to sue for punitive damages as they are currently limited by New Zealand law.[390]

In addition, those people such as: non-earners, housewives, young people, and visitors who under current law receive little or no compensation for loss of earning capacity; victims whose injuries cause greater pain and suffering, disfigurement, and loss of amenities of life than can be compensated with a $27,000 limit on noneconomic loss; and earners whose annual earnings exceed $63,458, the maximum amount on which ERC is paid, will be restored a remedy in the situation in which it is most fair to do so:[391] when the injury is produced by another's legally established fault.[392]

Another benefit of having the common law action assigned to the ACC is that if the ACC should create an enforcement arm composed of salaried lawyers, this will not only reduce the costs of litigation but could also serve to provide victims with legal representation for the portion of the cause of action not assigned to the ACC.[393]

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[388] *Cf.* J. STAPLETON, DISEASE AND THE COMPENSATION DEBATE 120 (1986). Dr. Stapleton recognizes that personal injury litigation may have a role in providing publicity, but argues that its role "based on the deterrent potential of publicity seems ultimately unconvincing." *Id.* at 120-21.

It is interesting to note that victims of the alleged failure to treat cervical cancer have now brought tort actions against the physicians involved but are awaiting a ruling by the ACC, which has the exclusive jurisdiction to determine coverage, Accident Compensation Act, 1982, § 27(3), as to whether they may proceed with their actions or must accept Compo benefits. Letter from John Miller to Richard S. Miller (Nov. 25, 1986). It is not clear whether publicity about the problem would have surfaced earlier if there had been a clear right to bring an action for medical malpractice.

[389] *See supra* text accompanying note 205.

[390] *Id*; *cf.* Love, *Actions for Nonphysical Harm: The Relationship Between the Tort System and No-Fault Compensation (With an Emphasis on Workers' Compensation*, 73 CALIF. L. REV. 857 (1985) (urging cumulative remedies for non-physical harm to augment no-fault compensation).

[391] *See* Klar, *New Zealand's Accident Compensation Scheme: A Tort Lawyer's Perspective*, 33 U. TORONTO L.J. 80, 88 (1983).

[392] It should be noted, however, that should the current proposals by the Law Commission for periodic payments for loss of capacity, *see supra* text accompanying notes 275-84, be adopted and be made available to earners as well as non-earners, then many of these serious inequities will probably be reduced or eliminated.

[393] New Zealand courts do not ordinarily permit contingent fee arrangements. Accident victims could thus ride the coattails of the ACC in situations where they could not otherwise afford to hire a lawyer to represent them in the action.

There are obviously problems which will arise if the cause of action is split between the victim and the ACC. These include problems of settlement, problems of control of the litigation, and

Finally, a most important benefit will be to provide a significant source of funds to reduce the costs of Compo. These funds would come from successful enforcement of tort rights and consequent recapture of funds paid out and to be paid out by the ACC. They would likely amount to millions of dollars, quite possibly hundreds of millions of dollars, each year and thus could be Compo's salvation.

Reintroducing tort liability as a supplement is by no means a retrograde step if it is seen as a necessary device to improve accident prevention and to preserve and perhaps to extend an effective and compassionate compensation scheme of which New Zealand can be very proud.

B. A Response

While my recommendation to the Law Commission, as just described, was not accepted, it evoked a somewhat more positive response from Professor Jeffrey O'Connell and from Professor Craig Brown and Ms. Margaret Vennell, both New Zealanders.[394]

First, these commentators expressed serious reservations about allowing tort actions for the full measure of damages along with a right to compensation, asserting concern that the assignment—the same as granting a right of subrogation to a social agency—"raises prospects of waste and duplication of very large proportion . . . ."[395] They next express a preference for a no-fault system which replaces tort liability, since they believe that granting no-fault benefits to victims who then retain the right to sue third persons for damages, as in the case of workers' compensation in the United States, subsidizes the tort action and leads to increases both in payouts—since the victim has little incentive to accept an early and relatively modest settlement—and in the number of third party actions.[396] They inveigh against such "double dipping" and complain that my proposal does not set a threshold below which Compo recipients cannot

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attendant conflicts of interest. *See* Submission to Law Commission, *supra* note 14, at 14-15. These may raise issues and call for solutions similar to those which may arise between workers and their employers in third party actions brought to recover damages also compensated by workers' compensation benefits and in actions brought to recover for personal injury and property damage where an insurer has paid to the insured the value of some or all of the damaged property.

[394] Reforming New Zealand's Reform, *supra* note 386. Professor Brown currently teaches at the University of Western Ontario; Margaret Vennell is a Senior Lecturer in Law at the University of Auckland.

[395] *Id.* at 6 (citing Blum & Kalven, *Public Law Perspectives on a Private Law Problem*, 31 U. CHI. L. REV. 641 (1964)).

[396] *Id.* at 7.

bring their tort claim.[397] They express fear that even without a contingency fee system in New Zealand my proposal might lead to a meteoric growth of tort claims in New Zealand, just as they have grown in other parts of the Western world, such as Canada, which do not permit the contingent fee.[398] Further, they even express doubt about the wisdom of providing the ACC with a right of subrogation while denying any separate right to pursue a claim to the victim who receives Compo benefits.[399]

It is suggested, however, that the problems predicted are not likely to be as serious as the commentators suggest where Compo benefits are substantial in relation to a victim's earnings and cover most of the victim's medical expenses, since under my proposal the victim could only sue for those damages *not* compensated for by Compo; the right to sue for compensated benefits would be exclusively the ACC's. Further, since the ACC's right to reimbursement from the tortfeasor is primary, in cases where liability is questionable or the tortfeasor has insufficient assets or insurance fully to satisfy a judgment, most or all of a negotiated settlement or of the amount received on execution of the judgment would go to the ACC and the victim would have to be satisfied with Compo benefits. To put it another way, one of the great advantages of Compo is that it tends to be very generous, at least to earners; the motivation to pursue an action to recover the difference between common law damages and the value of Compo benefits might not be nearly as great as it is under workers' compensation or automobile no-fault, where compensation is far less generous than Compo.

Where Compo is inadequate, however, as it is today with regard to non-earners, or where the potential tort award for noneconomic loss caused by the accident is great in relation to the payment expected from the ACC,[400] there is every reason to allow the victims to pursue their common law claim, and they will arguably have a strong incentive to do so. While a victim might indeed receive compensation both from Compo and from the tortfeasor, there will be no double-dipping in the sense of duplication or overlap of benefits.[401]

The purpose of implementing a supplemental tort system, after all, is to restore the deterrence provided by the common law system. Keeping recoveries and actions within limits may be achieved, if necessary, by adopting some of the modifications of the system suggested above.

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[397] *Id.* at 7-8.

[398] *Id.* at 8-9.

[399] *Id.* at 9-10.

[400] Either a lump sum under the current scheme or periodic payments based on percentage of disability under the proposed scheme.

[401] Indeed, to the extent the victim has received benefits from her employer to cover the losses of earnings or other expenses not compensated by Compo, she may have to reimburse her employer if she is successful in her tort claim.

In any event, having expressed their criticisms of my proposal, the commentators then proceed to suggest an ingenious twist which, in effect, restores the tort action in its full glory *unless the tortfeasor agrees within ninety days after the accident to reimburse the ACC for the cost of Compo benefits.*[402] Initially, the ACC would be subrogated to the common law rights of the victim to the extent of the value of benefits paid and to be paid by the ACC to the accident victim. If the alleged tortfeasor refused to reimburse the ACC for those benefits, however, both the ACC *and the victim* would be permitted to pursue their tort claims.[403]

Essentially, the principal difference between our proposals is that under the commentators' the tortfeasor can bar an action by both the victim and the ACC by paying the ACC the cost of its commitment to pay Compo benefits (or presumably by settling with the ACC) within ninety days of the accident. Under my proposal the victim could chose to pursue her action for damages in excess of her ACC benefits even if the tortfeasor settled with the ACC. Thus, the commentators' proposal creates a powerful incentive for a tortfeasor to settle with ACC which, admittedly, mine does not. In addition to enhancing fairness[404] and increasing deterrence by allowing the victim to sue for unreimbursed losses, however, I believe that restoring a right in the victim to sue for noneconomic as well as other uncompensated losses, would likely be a necessary condition to labor's giving up its right to lump sums for noneconomic loss under Compo.[405] If, however, the Law Commission's current recommendations for adding periodic payments for incapacity is provided for non-earners and visitors *and added to ERC for earners*, then there should be less objection to removing the victim's right to sue if the ACC settled its claim with the tortfeasor.

One further wrinkle, suggested by the commentators, is to allow victims to reject ACC benefits and instead to bring the common law tort action.[406] Under

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[402] This proposal is adapted, in turn, from one made by Professor O'Connell for adoption in the United States in cases of injuries by products, health care, and other activities. Reforming New Zealand's Reform, *supra* note 386, at 10 (citing O'Connell, *Balanced Proposals for Product Liability Reform*, 48 OHIO ST. L.J. 317, 328 (1987)).

[403] *Id.* at 11.

[404] *See* Klar, *supra* note 3, at 88 (asserting that the elimination of the common law action has resulted in "grave injustice" for some victims, such as those injured by intentional or reckless conduct).

[405] *See* G. PALMER, ACCIDENT COMPENSATION, *supra* note 3, at 228 ("[S]ection 120 has been the biggest source of contention under the Act during the first four years. It has provided the Commission with perhaps its most serious administrative headache. Now that lump sums are in the legislation it will not be easy to displace them. Their existence makes extension of the scheme to sickness problematic.")

[406] Reforming New Zealand's Reform, *supra* note 386, at 11 n.27. Variations to the tort action were also suggested, such as only allowing recovery where the claimant proves defendant guilty of "gross or wanton conduct," requiring a heightened burden of proof, and making plain-

the current Act this right seems justified because of the woefully inadequate benefits provided to non-earners and visitors, who are effectively deprived of their rights to reasonable compensation for their tort-based injuries by virtue of the level of benefits provided. If the Law Commission's new recommendations are accepted, however, the level of compensation for this group should improve considerably and the reason to provide such election should correspondingly diminish.

Finally, while the commentators agree with my proposal that tort actions by workers against their employers should not be reinstated, they go further than I by expressing a preference not to reinstitute tort actions for automobile accidents.[407] They suggest that requiring motor vehicle owners to pay liability insurance premiums in addition to Compo levies would be politically unacceptable[408] and they suggest that adequate deterrence might be achieved by "more individualized experience rating based on cooperation with the Ministry of Transport in shared data about the risk creating experience of individual motorists . . . ."[409] Unfortunately, as a result of life-time licensing,[410] levies which might be adjusted to reflect driving infractions cannot practically be imposed on drivers. Furthermore, motor vehicle owner levies are at a flat rate and also do not take account of the record of drivers of the automobile. In the face of these barriers to experience rating, I continue to believe that reinstitution of the tort action as a supplement to Compo is necessary to help deterrence to work in the increasingly dangerous driving context.

While the differences in our proposals discussed above do not seem to be very great and are certainly not insurmountable, what emerges from the debate, at bottom, is that I and the commentators, who include so thoughtful and dedicated a critic of the tort system as Jeffrey O'Connell, have joined in suggesting a modified reinstitution of that system in order to avoid the tragic consequences of virtually total externalization of accident costs produced by the advent of Compo and the failure to develop an adequate system of specific deterrence to replace the tort action.

VII. Extrapolating the New Zealand Experience to Other Nations

Because of its governmental structure as well as other conditions unique to the nation, its history, and politics, New Zealand's leaders found it relatively easy, in the early seventies, to adopt and implement a radical no-fault accident

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tiff and his lawyer jointly liable for defendant's attorney's fees. *Id.*

[407] *Id.* at 14-15.

[408] *Id.* at 14.

[409] *Id.* at 14-15.

[410] *See* Second Woodhouse Report, *supra* note 30, para. 239.

compensation scheme and to abolish the personal injury action.[411] New Zealand is a young democracy, a member of the British Commonwealth. Its parliamentary system, originally modeled on England's, however, has been modified by eliminating the upper house. There is no Bill of Rights or other external written constitutional document which might inhibit development of a radically new scheme of dealing with accident costs. Thus, there exists a unicameral legislature, the English tradition of party loyalty, and a powerful Prime Minister elected by the members of Parliament of the party in power.[412] This system evidently produces something close to "unbridled power,"[413] enabling that party to enact its desired programs quickly with little or no modification. If there are significant checks and balances in the process of legislation, they must come from within the party. Yet there is recent evidence that the system enabled the ministers in power, members of the Labour Party,[414] to inaugurate conservative economic reforms such as "corporatization" of the government-owned post office and post office bank and government-owned property, closing the coal mines, and selling off of publicly-owned industries and businesses, including the Bank of New Zealand and Air New Zealand.[415]

The significance of such freewheeling power for the present inquiry is that the New Zealand government has the apparent ability, almost at will, both to legislate new safety systems to replace deterrence lost by doing away with tort actions and to tinker with Compo in order to achieve greater efficiency and to reduce abuses. In few Western nations is there likely to be a greater ability to establish and then to adjust the accident compensation and prevention systems

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[411] *See generally* G. PALMER, ACCIDENT COMPENSATION, *supra* note 3, 63-130. Even so, it took almost four years to get the Bill passed. *Id.* at 143.

[412] *Id.* at 63.

[413] *See* G. PALMER, UNBRIDLED POWER 139 (2d ed. 1987) ("[I]n no United States legislature, and there are fifty-one of them, is it so easy to pass statutes as in New Zealand."); *Id.* at 219-20.

> We lack the checks on those powers which are found in other countries—we have no written Constitution and no upper house. Instead, Parliament's law-making powers are exercised by a single House and by the Governor-General. The Executive almost invariably controls the House and the Governor-General is obliged by convention—except in the most extraordinary circumstances—to assent to Bills presented to him by the Executive. Thus, the Executive, through Parliament, has very wide powers to take away our most precious rights and freedoms.

Id.

[414] It is the Labour Party which has required ships entering New Zealand harbors to declare whether they are carrying nuclear materials.

[415] The program, known popularly as "Rogernomics" after the Finance Minister, Roger Douglas, was based largely on the same economic theories as "Thatchernomics" in Great Britain and "Reaganomics" in the United States. Recently, as the drastic and painful reforms seemed not to be producing the hoped-for economic improvement, Minister Douglas was dismissed from the Cabinet by Prime Minister Lange. *See* Hayward & Sherwell, *Markets Descend into Gloom Following Douglas's Departure*, Fin. Times, Dec. 15, 1988, at 6.

in order to make them both work efficiently. If, then, New Zealand's Compo system has increased the cost of accidents to unacceptable levels—as I believe this paper demonstrates—and if the government has proved itself incapable or unwilling to adopt effective accident prevention mechanisms to substitute for the deterrence of the tort system—even though prevention has been explicitly assigned the very highest priority over rehabilitation and compensation—a pall is cast over the prospect that a more unruly democracy, such as the United States or any of its states, can ever *substitute* a reasonably generous no-fault accident compensation plan plus an effective accident prevention scheme for the current tort system along the lines being suggested by radical reformers in the United States.[416]

IX. For The Future

Viewed from the broadest perspective, in developed Western societies the problems of accident prevention and compensation are inextricably bound up with the larger problems of public health, poverty, and justice. A limitless variety of governmental and private instrumentalities and schemes, ranging from private charity at one extreme to the criminal justice system at the other, have evolved to deal with one or more facets of these interrelated problems. Usually, they operate interdependently, so that no one scheme can ever be identified as dealing only with a particular problem to the exclusion of all others. Often, since resources are limited, strong support for one scheme may undermine the effectiveness of others; each separate strategy is to that extent the enemy of other strategies. On the other hand, the combination of the various systems is synergistic; their combined effect is arguably greater than the sum of their individual effects. In the developed common law nations the law of negligence and, more recently, the law of products liability, have been among the more prominent instrumentalities in the mix of those that purport to deal with prevention and compensation. When New Zealand chose to scrap tort liability for personal

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[416] *See, e.g.*, Sugarman, *supra* note 9. Of course, the ability of New Zealand, a nation of slightly more than 3,000,000 people, to adopt effective prevention mechanisms is significantly influenced by limitations on its resources; by contrast, the United States already has many powerful safety and illness prevention strategies in place both at the federal and state level. Nevertheless, the New Zealand experience casts doubt on the prospects in the United States both for adopting no-fault compensation plans as substitutes for the tort system and adding the additional expensive strategies necessary to achieve effective prevention. The problem would be particularly difficult if some states desired to adopt a Compo-like program but others did not, thus weakening the possibility of uniform federal support.

In any event, building a no-fault system that concentrates on accident victims to the exclusion of equally deserving victims of man-made disease and illness may be a mistake. *See* J. Stapleton, *supra* note 3.

injuries in favor of a system of pure compensation, without at the same time inventing and imposing other injury prevention systems of equal efficacy, it may have weakened the synergy and thus unleashed an unacceptably large increase in accidents and their costs on the society. That is what the evidence presented in this paper suggests.

Thus, Compo has evidently had the effect, gradually as its workings have become more clearly understood since its inauguration in 1974, of removing for everyone the inhibiting knowledge or understanding, as imperfect as it may have been at the time in New Zealand,[417] that, to put it in lay terms, *my carelessness which threatens injury to others is likely to have unpleasant financial consequences for me and, even if it doesn't, it is against the law and not engaged in by good citizens.* Arguably, the long term existence of tort liability and the concomitant need to protect one's self by purchasing liability insurance builds a perspective for safety into each individual's subconscious mind without much regard to how effectively the system functions in fact to impose the costs of carelessness on the careless.

If that is correct then the map for the future of Compo drawn by the Law Commission in its most recent report—expanding the benefits while further externalizing the costs—seems to urge movement very much in the wrong direction. Instead, the greater need is to reintroduce the inhibiting influence of the tort system, as I and others have recommended. Indeed, reintroduction of that system could significantly reduce the costs of Compo, both by reducing accident costs and by removing costs of fault-caused accidents from the ACC, thus helping to finance greater coverage for Compo in the future.

For nations, such as the United States, which have tort liability systems in place, the message of New Zealand's experience has a negative and a positive aspect: First, it is naive to believe that it will be possible both to eliminate the tort system in favor of a compensation scheme and to re-create an adequate level of prevention by adopting effective administrative arrangements. Second, it may be possible at reasonable per capita cost to develop, through private insurers, or even through government,[418] a scheme of accident compensation which

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[417] For example, that compulsory liability insurance premiums for motor vehicles in 1970 were only $7.90 per year, *see* G. PALMER, ACCIDENT COMPENSATION, *supra* note 3. at 83, suggests that risk of being held liable for substantial sums because of driver negligence must have been very low.

[418] The costs of administering Compo, a government plan, have been very low: "For each dollar spent the following proportions were paid to or on the direct behalf of injured persons:

1983/84	89%
1984/85	90%
1985/86	91%
1986/87	93%

ACCIDENT COMPENSATION CORPORATION, REPORT OF THE ACCIDENT COMPENSATION CORPORATION FOR THE YEAR ENDED 31 MARCH 1987, 11 (1987).

covers, at least, a substantial part of lost earnings and other economic losses for persons suffering injury by accident, and to finance a part of the scheme by assigning tort rights of victims to the private or public provider. Adoption of such a scheme would solve the compensation problems often improperly attributed to the tort system. Agreements between the provider and the covered individual, whereby, (unless the victim rejected no-fault compensation,) the accident causer would be released from tort liability if the latter agreed, within a certain period after the accident, to reimburse the provider for value of the benefits it is required to pay to the victim, along the lines urged by O'Connell, Brown, and Vennell, would further reduce the costs of maintaining the deterrent aspects of the tort system.

Perhaps it is time, in one or more of the laboratories we call states, to give such a plan a try.

Because of its low cost and because it was feared that turning the administration of Compo over to private insurers could increase total annual costs by 32 to 69 percent (an estimate extrapolated from prior costs of workers' compensation insurance and third party automobile insurance), ACCIDENT COMPENSATION CORPORATION, PRELIMINARY PAPER NO. 2, THE ACCIDENT COMPENSATION SCHEME, A DISCUSSION PAPER 26, para. 126 (1987), the Law Commission did not recommend turning Compo over to private insurers. *See* SECOND WOODHOUSE REPORT, *supra* note 30, paras. 46, 47.

The Law Commission, however, did not consider the extent to which the low costs of administration under Compo were due to failures to prevent abuses of the system such as fraudulent claims or claims for illness parading as accidents. Private insurers would arguably have a strong motive to prevent such abuses. Furthermore, it was not appropriate to draw comparisons between the ACC and private insurers administering systems in which liability was based upon fault or upon the need to find a connection between the injury and the claimant's work.